

**New Jersey Court of Errors and Appeals.** 10

Between—

GEORGE F. CARTER, Trustee,  
Respondent,

AND

MARY L. K. CARTER *et als.*,  
Appellants.

Points of  
Respondent.

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On the trial before the Vice-Chancellor, there was no conflicting testimony. All of the facts were undisputed. The statement of the facts made by the Vice-Chancellor and included in his opinion (Case, p. 82), very carefully sets forth all the facts in connection with the case, and makes it unnecessary to dwell at all upon them here.

There appear to be only two points of issue in the case: 30

FIRST.—Was George F. Carter in a position to make a trust for his children at the time he bought the property and had the mortgage assigned to him in trust, without wronging creditors?

SECOND.—Did the assignment of the mortgage to Carter as trustee, and the *res gestæ* in connection with the assignment, constitute a valid trust? 40

The respondent would respectfully submit the following points to the Court:

## I.

That at the times the property was purchased and the assignment of the \$3,000 mortgage thereon was taken by the respondent in trust for his children, he  
10 was financially in a position so to do without wronging any person, that in reality he had a credit balance with Rolston & Bass, and that subsequently they sold the securities, held by them at the date of the assignment of the mortgage as collateral for his account, for sums which exceeded the amounts of his book indebtedness at those dates. This has not been in any way contradicted or controverted.

*Case, pp. 30-33 and 121-121.*

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## II.

That any disposition in trust for his children made at that time cannot be successfully attacked by Rolston & Bass.

## III.

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That the trust of the \$3,000 mortgage for the benefit of his children was made by and *with the consent of every person who at that time had any interest whatever in it*, viz., Carter, his wife and Miss Man.

In his opinion the Vice-Chancellor raised a question not brought out in the argument, viz., that Mrs. Louise Pentz, the obligor of the bond secured by the mortgage, might have some interest in hay-  
40 ing the bond cancelled. He appears to be of

opinion that the bond was canceled, so far as it concerned Mrs. Pentz and her husband, the obligors.

It does not seem to me necessary to even take this stand. So far as the testimony goes, and as was the actual fact, Mrs. Pentz had nothing to do with the assignment of the mortgage. Miss Man held the bond and mortgage; agreed to part with it. Did part with it to Mr. Carter; received his check drawn to her order in payment (*Case, p. 119, Ex. C, 7*), and at first gave a satisfaction price and afterwards, at Mr. Carter's request, substituted an assignment (*Case, p. 115, Ex. C, 3*). Mrs. Pentz had no interest in and nothing to do with the matter, or with its negotiation. She had, and has *no right, either legal, equitable or moral*, to ask for the cancellation, or any other disposition of the bond. There was no privity between her and Miss Man in the matter or between her and Mr. Carter. She was an "outsider" so far as anything connected with the assignment or cancellation of the bond and mortgage was concerned. *She sold and conveyed her equity of redemption in the property, and that only, and received pay for that and for that only.* She cannot complain of any disposition of the bond.

#### IV.

That the mortgage was not actually satisfied or cancelled by the payment of the \$3,000 to Miss Man and her execution and delivery of a satisfaction piece; that the cancellation of the mortgage would not have been complete until satisfaction piece was recorded and the mortgage cancelled, or some equity had intervened which required its cancellation. *That the satisfaction piece never was recorded. That no equity had arisen, or existed before the assignment was substituted,* by the consent of all concerned for the satisfaction piece.

## V.

That, even if the Court are of opinion that the mortgage was actually satisfied by the payment to Miss Man of the amount remaining due on the mortgage, the *mortgage was revived* by the acts of the parties concerned, taken immediately thereafter, by the substitution of the assignment for the satisfaction piece.

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## VI.

*That the right to revive a mortgage after the mortgage debt has been paid, if there are no intervening incumbrances or equities, has been well settled in New Jersey.*

Justice Magie, in his opinion in the case of *Traphagen vs. Lyons*, delivered in the Court of Errors and Appeals, reviews the decisions on this point up to  
20 the time the opinion was rendered (1884).

*Traphagen vs. Lyons*, 11 Stewart, 613.

On page 616 the Justice says.

“ The doctrine on this subject is settled in New  
“ Jersey. It is that the power to revive an obliga-  
“ tion discharged by payment is limited in its effect,  
“ and does not extend so as to affect rights ac-  
“ quired prior to such revival. In *Bolles v. Wade*,  
30 “ 3 Gr. Ch., 458, it was held that a bond and mort-  
“ gage, paid by the owner of the equity of redemp-  
“ tion, was discharged as to subsequent encum-  
“ brancers, and that, while the owner of the equity  
“ might give new life to the mortgage by procur-  
“ ing its assignment to a third party for his benefit,  
“ yet it could not be thereby restored to its lost  
“ priority in respect to the *subsequent encum-*  
“ *brancers.*

“ In *Large v. Van Doren*, 1 McCart., 208, Chan-  
40 “ cellor Green held that ‘ when a mortgage had

“ been diminished by payment, it was not competent for the parties to re-establish it for the full amount by reloaning the money paid thereon, to the prejudice of an encumbrancer who acquired rights *after the mortgage, but prior to the reloaning.*’ See also *Underhill v. Atwater*, 7 C. E. Gr., 16 (and 599).

“ In *Stout v. Vankirk*, 2 Stock., 178, *supra*, Chancellor Williamson held that ‘neither a judgment debtor nor a judgment creditor could, after the judgment had been paid, revive it as against a mortgage or judgment creditor *whose lien was acquired prior to the act of the debtor by which it is sought to affect his lien.* Payment by the debtor was held to operate for the benefit and as a release in favor of creditors having liens on the fund bound by the judgment.

“ In *Hoy v. Bramhall*, 4 C. E. Gr., 563, this Court held, in agreement with the court below, that an assignment of a mortgage made by the mortgagee at the request of the mortgagor to a third person, who paid only a *part* of the amount due thereon, the remainder being paid by the mortgagor, gave to the mortgage a new vitality for the whole amount, so far as it affected the mortgagor, which he was estopped in equity from controverting; but that, as to subsequent encumbrancers or grantees of part of the mortgaged premises, *intermediate the mortgage and its assignment*, the assignee’s rights were limited to the amount he had paid.

“ And this was in accord with the view expressed by this court and the court of chancery, in *Robinson v. Urquhart*, 1 Beas., 515, that the right to repledge mortgages once paid was complete, *except as to intervening encumbrancers.*

“ Applying the principles settled in these cases (which are in accord with decisions elsewhere), the result is that neither Torrey, the judgment creditor, nor Condit, the judgment debtor, nor both of them, could revive this judgment, if it had been paid, so as to restore its lost priority of lien, or to

“ give it force as against appellants who acquired  
 “ *rights intermediate the judgment and the time of*  
 “ *the assignment*, when its revival must be claimed  
 “ to have been brought about, if at all.”

It will be noted that in the above citation that  
 “ subsequent encumbrancers ” mentioned in *Bolles*  
 vs. *Wade* refers to encumbrancers who were sub-  
 sequent in lien to the mortgage or obligation  
 sought to be revived *at the time of the assignment*.

10 I can find no later cases than *Traphagen vs. Lyons*  
 in this State touching on this point.

In *Robinson vs. Urquhart*, on page 524, the Chan-  
 cellor says:

“ To sustain such a proposition, the counsel cited  
 “ a number of authorities, which showed that if the  
 “ debt is paid, the mortgage is paid. That is all  
 “ true. But this does not show that the same debt  
 “ may not be kept alive by renewals of the notes  
 “ which represent the debt, or that when one debt  
 20 “ has been paid, and the mortgage having answered  
 “ its purpose as respects that debt it may not again  
 “ be pledged as security for another debt. The  
 “ mortgage is the property of the mortgagor, and  
 “ there is no reason why he may not make use of  
 “ it for *any bona fide purpose*.”

And on page 524, he says:

“ A court of equity will keep an incumbrance  
 “ alive, or consider it extinguished as may best  
 “ serve the purposes of justice and the *just intent*  
 30 “ *of the parties* ” (cites authorities). \* \* \* “ And  
 “ I see no objection to it, if no *intervening* right  
 “ exists to prevent the justness of the application  
 “ of the rule, and the plaintiff has no such inter-  
 “ vening equity.”

In *Underhill vs. Atwater*, 7 C. E. Gr., 603, affirm-  
 ing *Atwater vs. Underhill*, cited by Justice Magie  
 in *Traphagen vs. Lyons*, Justice Depue says:

“ A mortgage which has been satisfied may be  
 40 “ given a vitality by a re-delivery by the mort-

“gagor—to the mortgagee, or to a third person,  
 “upon a new consideration, or for a purpose differ-  
 “ent from that for which it was made (*Robinson v.*  
 “*Urquart*, 1 Beas., 515; *Hoy vs. Bramhall*, 4 C. E.  
 “Green, 563). But to give such effect to the mort-  
 “gage the repledging must be made by the author-  
 “ity of the person whose *estate* is sought to be held  
 “for the new obligation. Mrs. Atwater was the  
 “owner of the mortgaged premises, and the mort-  
 “gage, when once extinct, could only be revived by  
 “an authority which emanated from her.” 10

*Is not this the present case?*

*Mrs. Carter consented to the assignment.*

In *Atwater vs. Underhill*, on page 20, the Chan-  
 cellor says:

“There can be no doubt but that a mortgagor  
 “may again use or negotiate a mortgage which has  
 “been satisfied and paid off and delivered to him,  
 “except as against *intervening securities.*” 20

This doctrine is set out in *Jones on Mortgages*,  
 as follows:

*1 Jones on Mortgages, Sec. 945 :*

“ \* \* \* And so if a mortgagor before paying  
 “the mortgage debt has the mortgage assigned to  
 “a third person, and afterwards borrows money of  
 “another and has the mortgage transferred to him  
 “as security for this loan, the latter assignment  
 “gives new life to the mortgage, although it was of 30  
 “no validity in the hands of the former assignee.”

Cites

*Bolles vs. Wade*, 5 N. J. Eq. R., 58,  
 and

*Hoy vs. Bramhall*, 19 N. J. Eq. R.; 74.

*1 Jones on Mortgages, Sec. 948.*

“Generally the chief difficulty in reviving or con-  
 “tinuing in force a mortgage which has been sub-  
 “stantially satisfied, is on account of the *interven-* 40

“ *ing rights* of other persons, which would be  
 “ thereby injuriously affected. The condition of a  
 “ mortgage having been performed, a subsequent  
 “ encumbrancer has the right to avail himself of  
 “ the advantage, and not to be postponed to equities  
 “ newly created which in fact are subsequent to  
 “ his own. Thus a mortgage given to indemnify  
 “ the mortgagee for his liability as an endorser of  
 “ the mortgagor’s note cannot, after the payment of  
 “ that note, be assigned for the mortgagor’s benefit  
 10 “ as security for another debt, as against the holder  
 “ of a second mortgage upon the estate *then* of  
 “ record, although as between the mortgagor and  
 “ the assignee it would be a good security.”

The Court will note that in all of the cases cited the only restriction on reviving a mortgage is where it will by so doing injuriously affect *intervening encumbrances or equities*.

*In the present case there were none.*

20 The Court will notice that the cases cited by the appellant are cases decided in the courts of *other States*.

## VII.

That the revival of a mortgage paid and satisfied is not restricted to cases where a new *debt* is created, or an old *debt* continued.

30 In *Robinson vs. Urquart, supra*, the Chancellor says it may be done “ as may best serve the purposes of justice and the *just intents of the parties* ” and when no intervening equity exists.

And again, “ the mortgage is the property of the mortgagor, and there is no reason why he may not make use of it for *any bona fide purpose*.”

In *Atwater vs. Underhill*, Justice Depue says it may be done “ upon a new consideration, or for a *purpose different* from that for which it was  
 40 “ made.”

In the same case below, in the Court of Chancery the Chancellor says, "A mortgagor may again use, "or negotiate, a mortgage," &c.

From these authorities, we must conclude that a mortgage can be, and should be, treated by the Court as revived for any legal or equitable purpose where there are no intervening encumbrances or equities to be injuriously affected.

The contention of Mr. Keasbey on the oral argument, before the Vice-Chancellor, that a revival could *only* take place in cases where a *new debt* was created seem to me not to be warranted by the cases he cited. <sup>10</sup>

It is not so stated in any of them, or even intimated. The citations from the cases cited by him above set out, clearly shows the contrary to be the case.

There can be no difference or distinction between the right of a person to use such a mortgage to secure a new debt and the right to have it assigned to establish a trust for the benefit of his children, <sup>20</sup> so long as no intervening equities or encumbrances are injuriously affected thereby.

### VIII.

That a trust of personalty may be created verbally and proved by parol.

In this case the assignment of the mortgage <sup>30</sup> passed the legal title to a trustee *eo nomine*, and the consents of all concerned to the trust, and its terms, completed it.

*Danser v. Warwick*, 6 Stew., 135.

In his opinion, the Vice-Chancellor says:

"A valid trust of personalty may be created verbally and proved by parol evidence. A trust of "personal property, almost precisely like the one <sup>40</sup>

“ under consideration, and which had been created  
 “ by mere spoken words, and was supported by  
 “ *only* parol evidence, was upheld by Chancellor  
 “ Williamson in *Thompson v. Holmes*, 3 *Stock*; also  
 “ *Kimball v. Morton*, 1 *Hol. Ch.*, 26; *Sayre v. Fred-*  
 “ *ericks*, 1 *C. E. Green*, 205; *Eaton vs. Cook*, 16  
 “ *C. E. Green*, 55; 2 *Story's Eq. Jur.*, § 972; 1 *Henry*  
 “ *on Trusts*, § 86. A valid trust of a mortgage  
 “ debt may be created by parole; for though a trust  
 “ thus created cannot embrace the land held in  
 10 “ pledge, yet it is good as to the debt, and will en-  
 “ title the *cestui que trust* to sufficient of the pro-  
 “ ceeds of sale, when the land is converted into  
 “ money to pay the debt (*Sayre v. Fredericks*,  
 “ *supra*; *Benbow v. Townsend*, 1 *M. & K.* 506;  
 “ *Childs v. Jordan*, 106 *Mass.*, 321.”

The above case is cited merely to show that a trust can be created and proved by parol.

The trust is evidenced by:

20 *First.*—Assignment of mortgage to respondent as trustee.

*Second.*—By the declaration of the creation of the trust, whether the respondent or his wife, and acceptance by the trustees.

*Testimony of Carter and his wife.*

They both state the trust was for the *benefit of*  
 30 *the infant children* of the respondent and his wife.

This is enough to constitute a valid trust. The law supplies the rest. The Courts will see that the trust is administered for the best benefit of the children.

The Court can order application of income to use of children during minority for their support and maintenance, if necessary. It can order the like application of part or even the whole of the principal, and when the infants become of age it will  
 40 see that they get the principal itself.

The only essentially necessary matter to establish was the *beneficial interest of the infants*. The law supplies the rest. It will make the trust complete and enforce it.

The case of *Landon vs. Hutrow*, relied upon by the appellant, was decided upon the ground that the trust was *in fieri*, that the title to the property placed in trust had not been transferred. The citations (*Perry on Trusts*, § 100, and *Lewin on Trusts*, p. 69) made by the Chancellor are to this effect. But in the present case the *title to the mortgage had actually passed to the trustee*.<sup>10</sup>

The consideration of this trust came within those approved by the Chancellor—provision for an infant child—and at the time it was made, and the trust property vested in the trustee, no one was wronged by making it. The appellant's debt and judgment came into existence long afterwards.

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## IX.

That *the object* for which the assignment in the present case was made is *a meritorious one*, and one which a court of equity will sustain, *if possible*.

The assignment was made in trust for the children to *prevent injurious effects from what actually did occur*. It was made to save something for the children in case the mother herself became involved, or was persuaded by her husband to sell or mortgage the premises.<sup>30</sup>

As matters turned out its wisdom has been clearly shown.

## X.

That nothing done, either by Mr. Carter or his wife, after the assignment in trust was made, can<sup>40</sup>

affect the assignment itself, or postpone it to the judgment of Rolston & Bass.

The record of the deed showed that the \$3,000 mortgage existed and was a lien. Deed was recorded two days after its execution and delivery.

*Case*, p. 118. Ex. C. 4.

The assignment likewise showed that the mortgage was in existence and a lien, and was held *in trust*.

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*Case*, p. 115. Ex. C. 3.

Besides, on January 11th, Mr. Carter so informed Mr. Hooley, and Mr. Hooley saw the mortgage and assignment.

*Case*, pp. 21-22.

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## XI.

That under the circumstances the cancellation indorsed in the mortgage was null and void.

As above stated Mr. Carter held the mortgage as the trustee of his children.

Messrs. Rolston & Bass had *constructive* notice from the public records that he so held it, and *actual notice* on January 11, 1900, from Mr. Carter  
30 himself, at the time the indorsement on the mortgage was made.

As trustee he had no right or power to apply the mortgage to the payment of his own or his wife's debts, or by cancelling it to increase the value of his wife's property upon which her creditors could levy.

Messrs. Rolston & Bass cannot take any advantage from the cancellation of the mortgage.

They had, as stated, both constructive and actual  
40 notice of the trust.

The Court can only look at their acts, in receiving the mortgage with the cancellation endorsed thereon and endeavoring to take advantage by it to increase the value of their levy, as parts of a conspiracy to wipe out a trust created for the benefit of the Carter infants, for the purpose of their own benefit and advantage.

## XII.

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That the words "Trustee for," &c., were not merely *designatio personæ*, but were words showing the capacity in which he (Carter) took the assignment and that thereby a valid trust was created.

The infants will be assumed to consent to the trust, as it was for their benefit. Mrs. Carter, in whose name the title to the property had been taken, consented to it.

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Rolston & Bass, who afterwards became creditors, had notice, both constructive and actual.

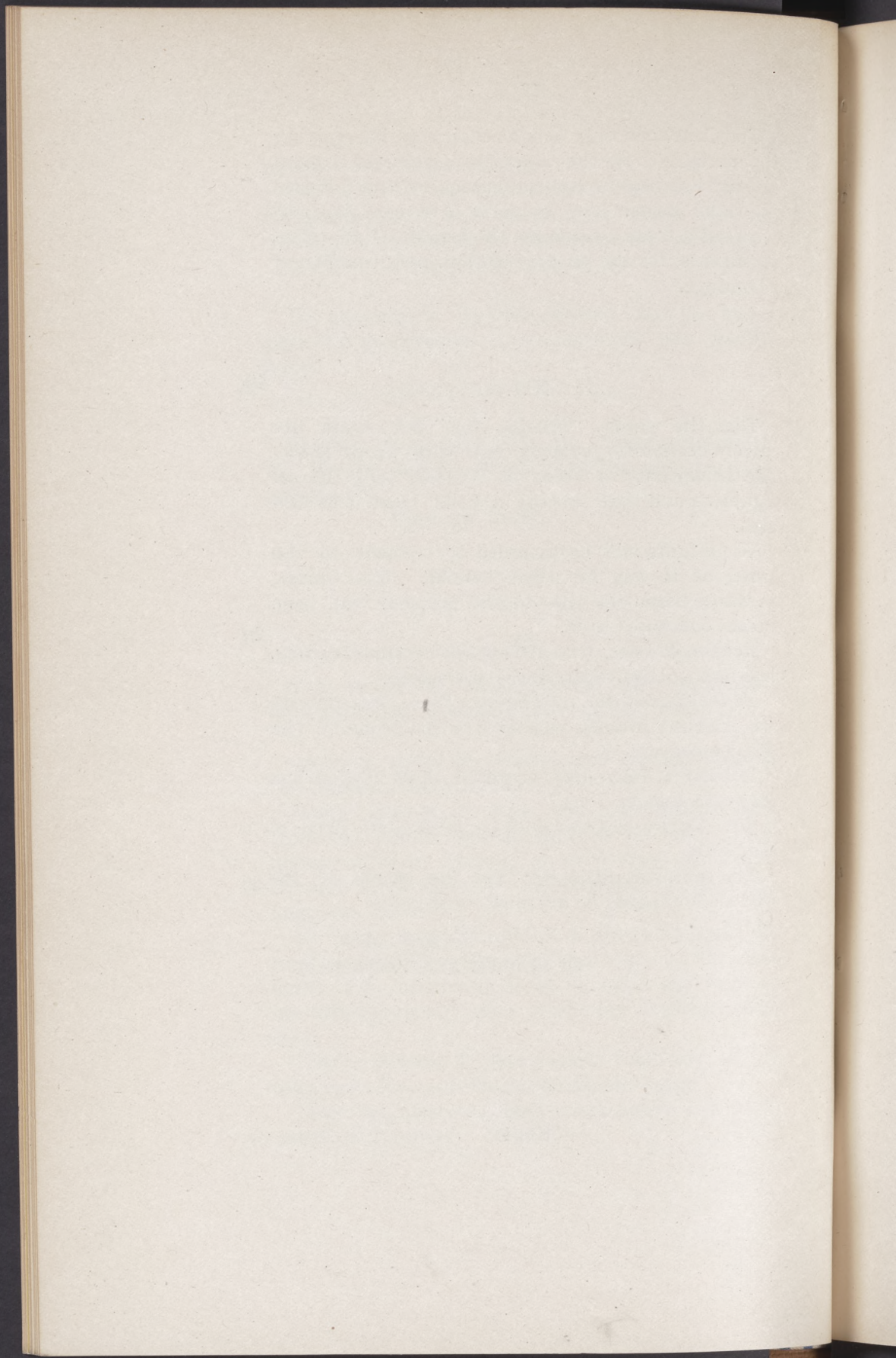
*At the time of the assignment* there was nobody who had any interest whatever in the property who did not consent.

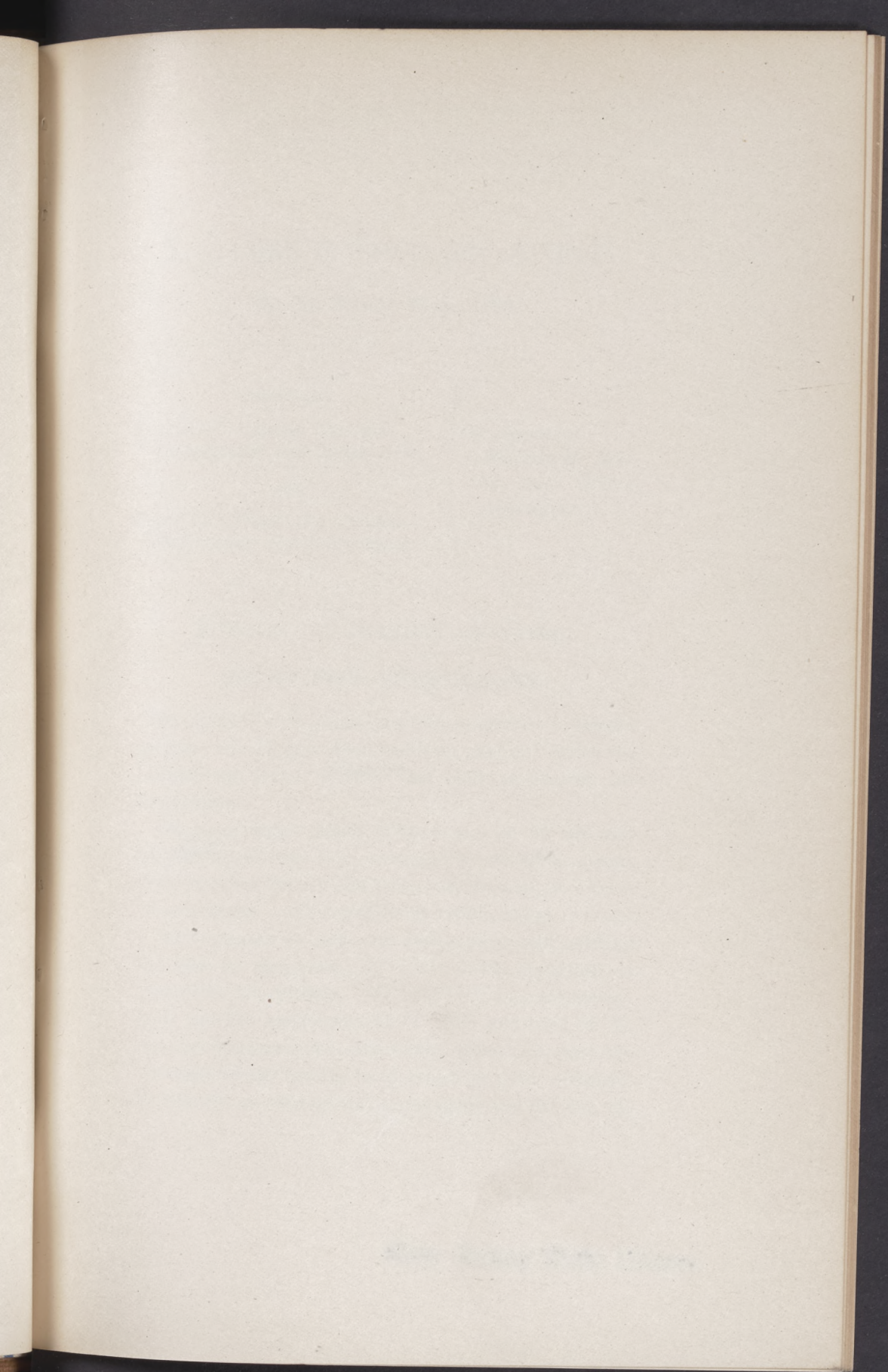
Rolston & Bass only acquired their alleged lien *long afterwards*.

*Mrs. Carter had had nothing to do with them at that time.*

The complainant insists that the decree of the 30  
Chancellor should be affirmed, with costs.

E. A. S. MAN,  
Of Counsel with Respondent.





1871

## N. J. Court of Errors and Appeals.

No. 24, MARCH TERM, 1903.

BETWEEN

GEORGE F. CARTER, TRUSTEE,  
*Complainant and Respondent,*

AND

MARY L. CARTER AND OTHERS,  
*Defendants and Respondents*

*On Appeal of  
William H. Rolston  
and Others,  
Appellants.*

EDWARD Q. KEASBEY, OF COUNSEL.

### BRIEF FOR APPELLANTS.

The decree in this cause sustains as against judgment creditors a mortgage which had been paid and which the complainant seeks to <sup>reserve</sup> save and hold as trustee for his children.

The complainant bought a house and lot for his wife for \$1,800 and paid off a mortgage for \$3,000 as a part of the purchase money and took a satisfaction piece from the mortgagee. Afterward he determined that it might be advantageous to treat the mortgage as still existing and take an assignment of it to himself described as trustee for his children. He held both the satisfaction piece and the assignment for a while and then, as he says, he destroyed the satisfaction piece and kept the mortgage though not the bond, which he never obtained. He collected no interest on the mortgage and did not put

the assignment on record until long afterward. He was indebted to his brokers at the time he took the assignment and shortly afterwards he opened an account for buying and selling stocks in the name of his wife. After this the assignment of the mortgage was put on record and when the brokers found fault with him for placing a mortgage on his wife's property he told them that the assignment had been made some time before and that the mortgage had been paid and that he would cancel it, and he got the mortgage and assignment and wrote on the back of each of them, "January 11, 1900. The within mortgage having been duly satisfied the Clerk of Union County is hereby authorized to cancel the same of record. George F. Carter, Trustee."

[On the assignment the words "Clerk of the Court" were used instead of "Clerk of Union County."]

The mortgage and assignment with these endorsements were delivered to the brokers and the accounts of Mr. and Mrs. Carter were continued until the following May, and then were closed, leaving both Mr. and Mrs. Carter largely indebted to the brokers. Judgments were recovered against both on these debts and a levy was made on the land of the wife upon a judgment recovered December 5, 1900, for \$4,763.85.

After the accounts had been closed at a loss and in consequence of a letter from the brokers' attorney (p. 46, l. 1), Mr. Carter wrote to the County Clerk directing him not to cancel the mortgage, and shortly afterwards (November 9, 1900) he filed the bill in this cause to foreclose the mortgage on his wife's property.

The brokers had no judgment at that time and were not notified of the suit; but, having recovered a judgment and made a levy in December, 1900, they made application to be admitted as parties defendant, and, having been admitted, they filed an answer and cross-bill,

insisting that the mortgage had been paid and cancelled and was in the defendant's possession and that there was in fact no valid trust for the children and that the mortgage was kept uncanceled of record merely for the purpose of protecting the wife's property from her creditors, and that the complainant was not entitled to a decree as against the judgment creditors and that said George F. Carter, trustee, should be directed to withdraw his notice to the County Clerk and discharge the mortgage and that the mortgage should be decreed to be satisfied, or, at least, postponed to the lien of the judgment.

The Vice Chancellor decided that the mortgage was a subsisting lien in the hands of the complainant as trustee for his children good against the judgment creditors.

We insist that the mortgage was confessedly paid and satisfied when the land was bought.

That the subsequent taking of an assignment did not as a matter of law either ~~revoke~~ <sup>renew</sup> the mortgage or make it as though it had never been.

That it is not a case of subrogation by which a lien of one person is preserved in equity for the benefit of another who, on equitable grounds, is entitled to it.

That it is not a case in which there is any equitable right to the exercise of the power of the Court of Equity to revive a mortgage already paid.

That, on the contrary, the equities are that the mortgage once paid should not be revived nor treated as if it had not been paid.

There was no definite trust created for the benefit of the children.

There was no declaration and nothing to show what

the trust was, or whether it related to the mortgage alone or to other property.

The confessed purpose of taking the assignment was to protect the property from creditors rather than to create a trust and the mortgage and satisfaction piece both remained in Mr. Carter's control.

Mr. Carter in fact cancelled the mortgage and gave it up to the defendants and, in the absence of proof of the terms of the trust, this of itself is sufficient to discharge the land in which the defendants have an interest, and the children must look to their trustee.

Mr. Carter having told the defendants that the mortgage was paid, written a cancellation upon it and given it up to them and they having extended the time of credit to Mrs. Carter on the faith of it and suffered loss thereby the children are estopped by the act of their trustee from saying that the mortgage is still a lien in the land.

The whole transaction was a fraud upon the creditors both of Mr. Carter and Mrs. Carter. Mrs. Carter has a levy upon the land claimed under the mortgage.

The alleged assignment to the complainant as trustee was voluntary, without consideration or even moral obligation. It was confessedly made to protect the property against future creditors and was made shortly before the opening of a speculative account in the name of the wife on which a loss was incurred and a judgment obtained, and on this ground also the mortgage is not good against these judgment creditors of the wife.

Testimony having been taken on both sides with respect to Mr. Carter's debt and the case tried as if there were a prayer in the cross bill to set aside the assignment

as void against Mr. Carter's creditors the Vice Chancellor should have allowed the application to amend the bill so as to give the defendants that relief in this suit when he denied relief with respect to the debt due from Mrs. Carter.

Mr. and Mrs. Carter were engaged in a hazardous business in buying and selling stocks and borrowing money from their brokers upon the security of the stocks themselves and a margin in the hands of the brokers.

Mr. Carter had made some profit and drew out \$4,100 and bought a house for 5,500 and took the title in his wife's name and told his brokers that he had done so and gave them to understand that there was no encumbrance upon it (pp. 50, 51, testimony of Mr. Carter; p. 59, testimony of Mr. Hooley). Three weeks after this an assignment was executed of the mortgage which had been paid when the house was purchased and in the following month Mr. Carter opened an account in the name of Mrs. Carter without advising the defendants of the mortgage and this is one of the accounts on which the loss occurred when the closing of it was extended because Mr. Carter gave the mortgage up as a mortgage that was paid and should be canceled.

The Vice Chancellor in stating the facts refers to the account as "a speculative account" and he alludes to the testimony on the part of the complainant to the effect that there was a margin in Mr. Carter's favor on July 20, 1899, the day before the purchase, and a smaller margin on March 9, 1899, the day before the assignment of the mortgage and also that the securities held on those two days were actually sold at such a price as not to wipe out the margin. But it must be observed that the margin was less than the usual ten per cent. even as shown on the statements made up by Mr. Carter, which he does

not pretend are anything more than estimates, and it must also be borne in mind that the account was a current account and there were other securities and other debts. These securities were sold to pay losses on others. The values and the margins were changing from day to day and a change of a few points in value one day meant loss and even disaster. Such an account with such a margin is dangerous at any time and the loss that occurred in the end did occur because the Carters did not direct their stocks to be sold when the price was high, as he admits he had a right to do (p. 37, foot of page), but induced the defendants to continue the account until the margin was wiped out and a loss occurred.

It is noted also that these statements and Mr. Carter's testimony, of which they are merely a summary, relate to the account of Mr. Carter and not that of Mrs. Carter. The proof is that Mr. Carter was engaged in speculative dealings at the time the property was bought and put in his wife's name and that his margin was small and was afterwards turned into a deficit for which judgment was obtained and that a similar account was opened in Mrs. Carter's name shortly after the taking of the assignment of the mortgage that had been paid and that this account also was closed at a loss, the account having been extended for some months after the mortgage had been given up to be cancelled.

It is under these circumstances that we contend that the complainant should not be permitted to obtain a decree giving him a lien upon the land prior to the judgment of the defendant against his wife or against the claim of the defendants to have the land made subject to their judgment against Mr. Carter himself.

The Vice Chancellor approaches the case as if the question was simply whether the infants have acquired an

incumbrance on the land which is good as against their mother.

It might well be that they had acquired such an interest as a court of equity would establish a against their mother and yet that the court would not establish it against the creditors of their mother with a lien upon the legal title to the land and against creditors who had been given credit on the faith of a clear title.

The question is not whether as against their father and mother the attempted gift can be established, but whether the court should exercise its ingenuity or its power to establish it against creditors.

The Vice Chancellor decides first that a valid trust has been created for the benefit of the infants and he bases this upon his opinion that Mr. and Mrs. Carter intended in good faith that the assignment should operate as a conveyance of property to Mr. Carter as trustee for the two infants.

I submit that this is not established by the proofs. The evidence is that of Mr. and Mrs. Carter themselves. Mr. Carter says (p. 26) that after he had got the deed and the satisfaction piece, his friend, Mr. Kyte, suggested to him that *to secure the property more properly* it would be better to have an assignment of the mortgage. Mr. Carter says (pp. 42, 43) that his idea was to make the *property as secure as he could for his wife and children*. So that they should always have a home, and the mortgage should remain to prevent anything from getting it away from them. He said he wanted to make sure that his wife should never lose the property by reason of any indebtedness she might incur and "that was the only purpose" (p. 42), and that Mr. Kyte told him it would tie up the property more securely than in

any other way and save something for the children in case his wife became indebted.

Mrs. Carter evidently had very little knowledge or understanding of the matter and the Vice Chancellor's theory is that it was her husband and not Mrs. Carter that made the gift. She only says that when she heard of the assignment she thought it would be nice for the children and she could not explain why it would not have been as well to have the property free and clear in her own name except that it would be nice for the boys to have something (p. 76).. The primary purpose was to keep the property secure against any creditors of the wife and there is nothing to show that Mr. Carter or Mrs. Carter intended to make an irrevocable gift to the children.

There was no such intention when the deed was taken or when the assignment was first suggested. Mr. Carter kept the satisfaction piece until after he had obtained the assignment. He held both at the same time and could have recorded either the one or the other, and he cannot say when he destroyed the satisfaction piece except that it was shortly afterwards (p. 42).

That he did not intend to make an irrevocable gift is evident from the fact that he cancelled the mortgage and gave it up to the defendants as soon as they found fault with him for putting an incumbrance on his wife's land.

The confessed purpose was to protect the property from the wife's creditors, although she had no creditors at that time. A speculative account was opened in her name within a month and the fair presumption is that it was against this account that the assignment was intended as a protection in case it should be necessary. This and not the making a gift to the children is the purpose shown in the testimony.

The mere description of Mr. Carter as trustee in the

assignment made by Miss Man does not create him trustee. There is no proof of a pre-existing trust. Nor any declaration or definition of a present trust. It is a mere description in a paper signed by another and this cannot fix the rights or duties of either party to the supposed trust. There is nothing to prove that Mr. Carter in having this assignment made to himself, described as trustee, intended anything more than to enable himself to protect the property against creditors and to use it for the benefit of the children or not as he might see fit.

The case is like those referred to by the Vice Chancellor where by reason of convenience a savings bank deposit is made in one's own name as trustee when in fact no real trust is intended and the beneficial as well as the legal interest are in fact retained. The testimony of Mr. Carter shows this to be the case. His only purpose was to protect the property in case of his wife's indebtedness (p. 42), and there was no intention of putting the mortgage beyond his own control.

The donative purpose is not proved, the instrument does not declare the trust and, as I shall show, it was not a legal conveyance of existing property and the cases cited by the Vice Chancellor on p. 93 do not decide the question at issue here.

*The mortgage attempted to be assigned to the complainant as trustee had, in fact, been paid. It had no legal existence and could not be made the subject of a trust.*

The Vice Chancellor concludes that the trust was good if the assignment was a legal conveyance and the mortgage in fact existed.

He concedes that equity will not aid in carrying out an imperfect gift.

It is well settled that it is only when there is a distinct

irrevocable declaration of trust vesting the equitable title of an existing thing in the *cestui que trust* that the trust will be enforced in favor of a volunteer even against the settlor himself.

Percy on Trusts, Sec. 96.

Where anything remains to be done to perfect the title, equity will not interfere to aid a volunteer even against the settlor.

*Antrobus v. Smith*, 12 Ves. 46.

*Holloway v. Headington*, 8 Simon 328.

But the Vice Chancellor insists that although the mortgage had in fact been paid, it did still exist and could be made the subject of a valid legal assignment and the basis for a declaration of trust and the subject of a gift in trust so as to give a title to these volunteers which can be maintained against judgment creditors.

He makes a careful analysis of the facts in order to determine whether Mr. Carter or Mrs. Carter is to be considered as the donor and he concedes that if Mrs. Carter is the donor there is nothing on which the gift can operate and that there is no complete and legal gift and no sufficient proof of any contract on her part to charge her land in favor of the children (p. 95). "The mortgage so supposed to have been revived," he says, "was one to which Mrs. Carter was never a party and had never assumed; the debt secured by it had been knowingly paid without any feature of fraud or mistake, and the bond which the mortgage was given to secure not only had been discharged but remained discharged and is not supposed to have been revived. \* \* \* How she could make a gift by procuring the former holder of this paid mortgage to execute an assignment of the same to the donee is difficult to perceive" (p. 95). Whether by estoppel or otherwise

she succeeded in effecting a legal donation in trust for her children of an interest in this land to the extent of \$3,000 he did not decide, because he concluded that she was not the actual or intending donor inasmuch as she never was the owner of the subject matter of the gift, and he concludes that the gift was the gift of the father and consisted of a transfer of the property which belonged to him in equity and which he controlled.

*There was in fact no property in existence to be the subject of legal gift by the father to the children. It is only by assuming things done to be undone and creating an equitable charge out of a paid mortgage that the court can make a subject for this trust.*

The mortgage was in fact paid when the deed was taken. There was no pretense of any mistake. It was deliberately paid and the satisfaction piece was given with the deed (pp. 26, 41) and the bond was not asked for nor received (p. 45), and Mrs. Carter was told in advance that the title was to be taken free and clear (p. 27). The money was all paid at once on the passing of the title and Mr. Carter says it was paid for the property and that it was intended that the mortgage was paid and that the assignment was entirely an afterthought (p. 72). He had no knowledge of the clause written in the deed stating the conveyance to be subject to the mortgage (p. 70) and this was doubtless inserted for the protection of the grantor on his covenants. The amount of the mortgage was paid to the mortgagee, but it was paid for the property and on the purchase of the property free and clear for the benefit of the wife and according to previous understanding with her and the intention he had expressed to Mr. Hooley, one of the defendants (p. 73).

The Vice Chancellor restores the mortgage by means of a laboriously constructed theory of a rejection of a

part of the gift by the wife, who is supposed to have thrown a part of it back on her husband's hands. As a matter of fact he took the title free and clear for her with her assent and put the deed on record on the next business day. It was acknowledged February 21. The next day was Washington's birthday and the deed was recorded on the twenty-third. It does not clearly appear when it was that the assignment was first talked of to Mrs. Carter. She says she is not sure what night it was that we talked it over, whether it was the next night or some other night (p. 81, foot of page). There was no rejection of the gift to her but merely the assent to <sup>a</sup>suggestion made by Mr. Kyte to protect the property by means of an assignment. The deed was sent at once to be recorded and the wife was the owner of the property free of encumbrance and the assignment of the paid mortgage was not obtained until three weeks later, on the tenth of March.

It was certainly not the sad case pictured by the Vice Chancellor of a husband disappointed by his wife's rejection of his proffered gift. Mr. Carter simply changed his mind and told his wife so, and between them they tried to devise a way to protect the property against her creditors, so as to be sure to keep a home for themselves and their children. There was no need to ask for subrogation to accomplish this purpose. The title was in her and the mortgage was paid. All they had to do was to make a new mortgage to some one else as trustee, but this would have put the mortgage beyond their own control and this they did not wish to do.

It is only by establishing an equitable restoration of the mortgage by subrogation to Mr. Carter of the rights of the mortgagee that the Vice Chancellor is able to find "an existing encumbrance" upon which the trust

will operate and so establish a valid and complete trust for the benefit of the children. I submit that it is not true that "in equity Mr. Carter was entitled to be subrogated to Miss Man as holder of the mortgage," and that there was no existing encumbrance on which the subsequent assignment and alleged declaration of trust could operate and therefore the declaration of trust was of no effect.

It is well settled that as a general rule a mortgage once paid with deliberate intention by one whose place it is to pay it is *functus officio* and neither the mortgagor nor any one else has the power to transfer it as a subsisting security or to revive it to secure the same or any other liability.

McGiven v. Wheelock, 7 Barb. 22.

Mead v. York, 6 N. Y. 449.

Ledyard v. Chapin, 6 Ind. 320.

Thomas' Appeal, 30 Pa. St. 378.

Boone on Mortgages, Sec. 156.

Though as between mortgagor and mortgagee the courts for sufficient cause may allow the parties to keep the mortgage alive by virtue of a subsequent contract, provided such arrangement does not interfere with the rights of third persons.

Mead v. York, 6 N. Y. 449.

Spencer v. Fredendall, 16 Wis. 666.

Boone on Mortgages, Sec. 156.

But not to the prejudice of subsequent encumbrancers prior to the revival.

Large v. Van Doren, 2 McCart. 208,211.

Purser v. Anderson, 4 Edw. Ch. 17.

Gardner v. James, 7 R. I. 396.

Jones v. Brogan, 2 Stew. 137.

And a mortgage once paid cannot be revived and made

security for a new debt without the formalities of a new mortgage. If the debt is actually paid the mortgage is also paid.

Spencer v. Fredendall, 16 Wis. 666.

Peckham v. Haddock, 36 Ill. 38.

Thomas on Mortgages, 2d Ed., Sec. 439.

Stoddard v. Hart, 23 N. Y. 556.

When the purchaser takes an assignment of the mortgage and his payments are made for the purpose of discharging the debt, and he has no intention of keeping alive the mortgage, he cannot afterwards, upon a change of his intention, or upon a change of the surrounding circumstances insist upon the mortgage as a subsisting security to the injury of third persons.

Hatch v. Kimball, 16 Mo. 146.

Starr v. Ellis, 6 Johns Ch. 393.

Lynch v. Pfeiffer, 110 N. Y. 33.

Jones on Mortgages, 4<sup>th</sup> Ed. See 855.

A mere stranger who voluntarily pays money due on a mortgage and fails to take an assignment of it but allows it to be cancelled and discharged cannot afterwards come into equity and, in the absence of fraud, accident or mistake of fact, have his mortgage reinstated and himself subrogated to the rights of the mortgagee.

Thomas on Mortgages, Sec. 445.

Acer v. Hotchkiss, 97 N. Y. 393.

Guy v. DuUprey, 10 Cal. 195.

Wolf v. Walter, 56 Wis. 292.

The revival of a mortgage can only be made by the owner of the land and is equivalent to making a new mortgage and is not permitted against the rights of third parties. The case at bar is not the case of the revival of a mortgage by the owner. This was conceded by the Vice Chancellor. The only contention is that Mr. Carter had a right of subrogation to the rights of the

mortgagee and subrogation cannot be had unless there be substantial existing rights to be protected, subsequent title or encumbrance, a liability for an existing debt or the correction of mistake or the preventing of fraud, and none of these elements are found in this case.

Pomeroy Eq., 1213-1215, 1419.

The conclusion is *that there was not even in equity an existing subject of a declaration of trust or a gift to the children*. There was only an assignment of a paid mortgage and even as against Mrs. Carter there was no equity in favor of Mr. Carter or of the infants, to have the mortgage restored and the gift established.

Even if there be an equity, *there was at law no existing mortgage or charge that was the subject of the trust or gift and the court must exercise its equity powers to create the subject matter and to establish the gift. This it will not do in favor of volunteers and to the prejudice of judgment creditors having a legal charge upon the land*.

It is the well settled rule, as the Vice Chancellor says, that equity will not aid in carrying out an incomplete gift. "Equity will not create a trust or establish the relation of trustee or *cestui que trust* by enforcing an agreement or giving effect to an imperfect conveyance or assignment in favor of volunteers."

Ellison v. Ellison, 6 Ves. 656.

1 Ldg Cases in Equity (pt. 1).

Janes v. Falk, 5 Dick. Ch. 468.

Landon v. Hutton, 5 Dick. Ch. 500, 508.

Antrobus v. Smith, 12 Vesey, 39.

Jones v. Lock. L. R., 1 Ch. App. 25-28.

Perry on Trusts, Sec. 96, 97.

Lewin on Trusts, p. 69.

Some of these cases refer to an imperfect conveyance

of an existing thing but the principle is applicable to a regular assignment of a thing that has no legal existence. The court of equity must act to create the subject matter and so make a good gift and this it will not do in favor of volunteers and against a good legal encumbrance.

In the present case there is no actual declaration of trust but merely an assignment to one described as trustee and, as we have seen, the intention to create an absolute trust is negatived and the nature of the trust is vague.

“The donor must have intended to create the trust and place it beyond his control as owner. If from the whole transaction it appears that he had no such intention, then his declaration of a gift in trust, however formal will be unavailing to create a trust.”

Thornton on Gifts, p. 423.

The naming of the children was merely incidental to the expressed purpose of protecting the property from creditors and there was no obligation to make provision for them. It was a mere gratuity and there was no such meritorious consideration as would bring it within the principle referred to in *Landon v. Hutton*, 5 Dich. Ch. 500, 515.

The defendants have an actual lien upon the land under a judgment against the owner and they have a right to insist that a court of equity shall not exercise ingenuity to restore and enforce against them in favor of volunteers a mortgage that was confessedly paid or to establish a trust that depends upon the restoration of that mortgage.

*The infants are estopped by the action of their trustee in cancelling the mortgage.* The defendants' judgment was founded on a loss that occurred because of exten-

sion of credit given on the delivery of the mortgage up to be cancelled. There was the usual margin in the account then and there would have been no loss at that time. Mr. Carter had told Mr. Hooley that the title was put in his wife free and clear (pp. 50, 59, 72) and did not tell him of his change of plan (p. 73) and when Mr. Hooley heard of the mortgage he was much excited and if he had not been told the mortgage had been paid he would doubtless have closed the account very soon (p. 64).

The collateral became less valuable by the delay and they suffered increased loss (p. 64).

The defendants had a right to rely on the defendants' statement that the mortgage had been paid. A trustee has a right to accept payment of a mortgage and cancel it. The Vice Chancellor says that if when he said it was paid he meant that it was paid when he got it and that he had revived it and was now willing to cancel it for nothing, the defendants ought to have known that he was committing a breach of trust. How they could find out that he meant all these things is hard to understand, but as a matter of fact Mr. Carter says distinctly that he did not mean "paid at the beginning" (p. 52) and yet the Vice Chancellor says he really did mean that and that Mr. Hooley ought to have understood him so.

Mr. Carter told Mr. Hooley that the mortgage had been paid and he did not explain that he meant paid before he took it and if he had, it would not have shown that he had not right to cancel it.

Mr. Carter as trustee having given this assurance and paid and cancelled the mortgage and given it up with instructions to the County Clerk to cancel the record, the children must look to him for redress and cannot foreclose the mortgage which their trustee has cancelled.

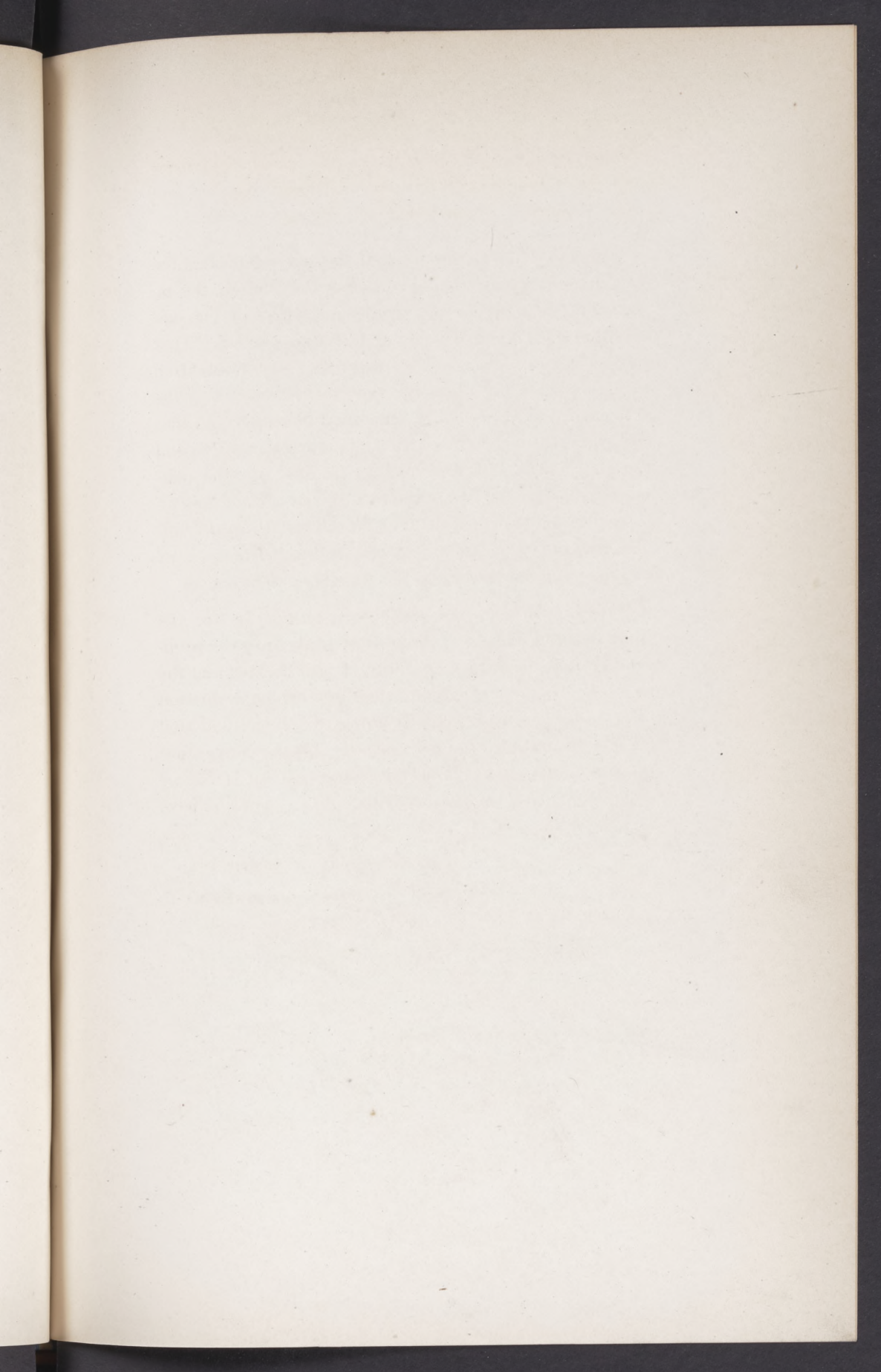
They should at least have filed a bill against the trustee and the defendants to have the mortgage restored and there is nothing in the pleading praying such relief.

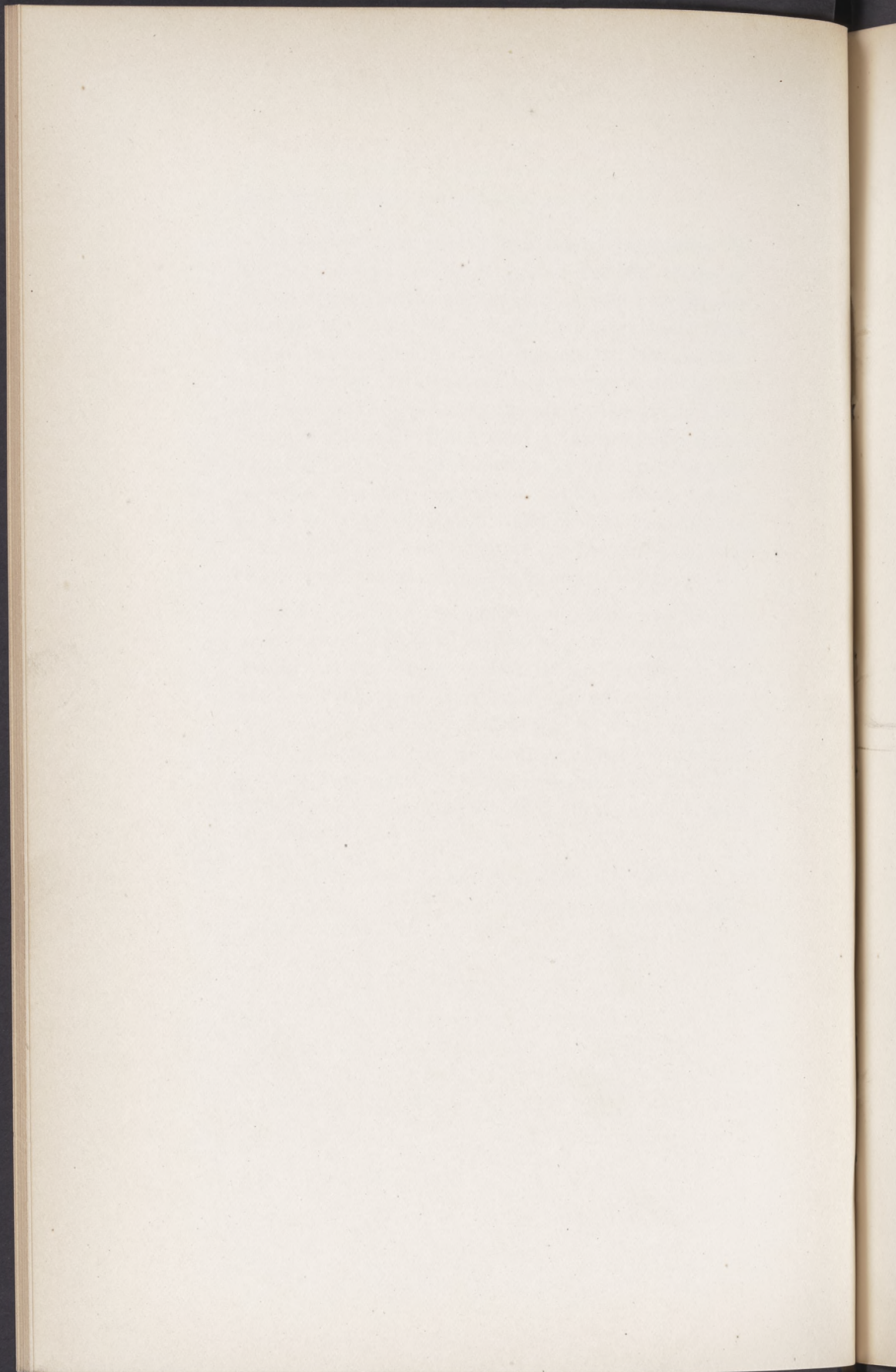
I submit that the complainant has not established the mortgage as an existing security at the time of the assignment, that he has not avoided the effect of the cancellation of it upon which the defendants relied. That he has not established a definite trust for the children or a completed gift, that the very subject matter of the gift must first be created by the court of equity and that the court will not do this against judgment creditors and especially in a bill filed merely to foreclose the paid mortgage, that the complainant and the infants are estopped from asserting their claim against these defendants and that the attempt to restore the mortgage is of no effect against the lien of the defendants' judgment.

I insist also that the whole transaction was for the conscious and expressed purpose of protecting the property against the future creditors of Mrs. Carter and the existing creditors of Mr. Carter and in contemplation of opening a speculative account in her name and that on this ground also the mortgage or else the conveyance to Mrs. Carter should be set aside and that for the latter purpose an amendment of the bill ought in justice to have been allowed.

EDWARD Q. KEASBEY,  
*Counsel for Appellants.*

March Term, 1903.





## N. J. Court of Errors and Appeals.

BETWEEN	}	<i>On Appeal of Wil- liam H. Rolston, Walter A. Bass and Edwin S. Hooley.</i>
GEORGE F. CARTER, TRUSTEE, Complainant,		
AND		
MAY L. K. CARTER AND OTHERS, Defendants		

### STATE OF THE CASE.

#### ABSTRACT OF BILL OF COMPLAINT.

Bill in Chancery filed November 9th, 1900, E. A. S. Man, Solicitor for complainants.

The Bill recites a Bond and Mortgage made by Leona Pentz and William E. Pentz, her husband, to the Central New Jersey Land Improvement Company, for \$3,500, dated April 16, 1894, Registered May 31, 1895, in Book 126, p. 344, Union County, for two years, at six per cent. Covering premises on North avenue, in Fanwood, Union County, New Jersey.

It alleges that the Central New Jersey Land Improvement Co. on January 6th, 1899, assigned this Bond and Mortgage to Jane Man.

That Jane Man on February 21, 1899, assigned the same Bond and Mortgage to the complainant, George F. Carter, Trustee, for Frank E. Carter and James B. Carter.

The bill then makes the following allegations as to this assignment:

And your orator further shows that, at the time the above mentioned and described bond and mortgage were assigned as aforesaid to him as trustee for the said Frank E. Carter and James B. Carter, by the said Jane Man, he personally and out of his own moneys, paid the purchase or consideration money therefor to her and that she, at his express request and direction assigned said bond and mortgage to him as trustee for his children, the said Frank E. Carter and James B. Carter, infants, and that at all times thereafter he has held said bond and mortgage as trustee for the use and benefit of his said children and not otherwise.

And your orator further shows that on the twenty-first day of February, one thousand eight hundred and ninety-nine, the said Leona Pentz and William E. Pentz, her husband, conveyed all the right, title, interest and estate which they had or claimed to have had in said mortgaged premises to May L. K. Carter, wife of George F. Carter, by virtue of which conveyance, the said May L. K. Carter claims to have some interest or estate in the said premises and the said George F. Carter, her husband, claims an inchoate right of courtesy, or some other interest or estate therein; but your orator expressly charges that the said conveyance was made subsequent to and with full knowledge of your orator's said mortgage and is subject thereto.

The bill further alleges that the sum of \$3,000 is due on this mortgage, besides interest; that May L. K. Carter and George F. Carter, her husband, are in possessieon of the premises; that the premises are scanty security for the debt, and that May L.

K. Carter and George F. Carter refuse to pay principal and interest, etc., being the usual formal allegations in a foreclosure bill.

The bill prays for answer upon oath and asks for a decree for the payment of principal, interest and costs and a sale of the premises.

There is a prayer for subpoena to the defendants, May L. K. Carter and George F. Carter, her husband, and Frank E. Carter and James B. Carter, infants.

Subpoena issued November 15th.  
Returnable December 3rd.

ABSTRACT OF PETITION OF WILLIAM H.  
ROLSTON, WALTER A. BASS AND ED-  
WIN S. HOOLEY TO BE ADMITTED AS  
DEFENDANTS.

The petitioners allege that they are partners as bankers and brokers in the City of New York under the firm name of Rolston & Bass; that on December, 5, 1900, after the filing of the bill of complaint they recovered a judgment against May L. K. Carter in the Supreme Court of New Jersey for \$4,763.85; that execution was issued and a levy made on the mortgaged premises December 7, 1900; that the complainant claims to hold a mortgage on the premises for \$3,000, which the petitioners are advised is not a valid lien, and that that they are advised that their judgment and execution constitute a prior lien upon the premises, and they pray to be admitted as parties defendants.

Petition filed December 20, 1900.

## ABSTRACT OF ORDERS THEREON.

An order was made December 21, 1900, directing the complainants and defendants to show cause why William H. Rolston, Walter A. Bass and Edwin S. Hooley should not be admitted as parties defendant, and on December 26th, it appearing that due service of the order to show cause had been made, it was ordered that William H. Rolston, Walter A. Bass and Edwin S. Hooley, partners under the firm name of Rolston & Bass, be admitted as parties defendant, and that they have twenty days within which to file their answer and cross bill.

## ANSWER AND CROSS BILL.

The answer of William H. Rolston, Walter A. Bass and Edwin S. Hooley to the bill of complaint of George F. Carter, trustee.

These defendants answering the said bill of complaint say that they admit that Leona Pentz and William Pentz, her husband, on or about the sixteenth day of April, eighteen hundred and ninety-four, executed a bond and mortgage for thirty-five hundred dollars to the Central New Jersey Land and Improvement Company, as in the bill of complaint set forth, and that said bond and mortgage were assigned by said company to Jane Man on the sixth day of February, eighteen hundred and ninety-nine, and were afterwards on or about the twenty-first day of February, of the same year, assigned by her to George F. Carter, described in the assignment as trustee for Frank E. Carter and James B. Carter, and that on the same day the mortgaged premises were conveyed by Leona Pentz and

William Pentz to May L. K. Carter, wife of the complainant, George F. Carter, but whether on the assignment of the said bond and mortgage by Jane Man to George F. Carter he personally and out of his own moneys paid the purchase or consideration money to her these defendants have no knowledge, and they do not know whether it was at his request and on his direction that she assigned the bond and mortgage to him as trustee for the children, nor whether he held the same as trustee for the use and benefit of his children, but they believe and charge the fact to be that the said bond and mortgage were in fact paid at the time of the purchase of the property and the conveyance thereof to the wife of the complainant, which was simultaneous with the making of said assignment, and that no trust was in fact created in favor of the said Frank E. Carter and James B. Carter, who were the complainant's children, and that if any trust were created it was wholly voluntary and without consideration, and the said bond and mortgage were subject to the disposition and control of the complainant, and that they were kept uncanceled not for the benefit of his children, but for the purpose of protecting the property of his wife against the claims of creditors.

And these defendants further answering say that they were then and still are creditors of the said May L. K. Carter and George F. Carter, her husband, who were then and still are indebted to them in large sums of money for moneys loaned and for moneys paid to their use in the purchase and sales of stocks on their account, and that afterwards, and while they were so indebted, and for the purpose of obtaining further credit and further

loans and advances, the said George F. Carter represented to these defendants that his wife was the owner of the said mortgaged premises, free of encumbrance, and on the eleventh day of January, he produced the said mortgage and assignment and assured them that it had been paid, and wrote thereupon in their presence the words, "January 11, 1900. The within mortgage having been duly satisfied the Clerk of Union County is hereby authorized to cancel the same of record. George F. Carter, Trustee," and thereupon delivered the said assignment and the said mortgage so endorsed for cancellation to these defendants, and thereupon they, at his request, extended further credit to the said May L. K. Carter, the complainant's wife, and made further advances to her upon the faith of the said assurance of her husband that she owned said premises, free of encumbrance, and upon the faith of the assurance that said mortgage had been paid, and the said direction to the Clerk of Union County to cancel the same of record, and by reason of the delivery of the said mortgage and assignment to them.

And these defendants further answering say that the debt so incurred remains unpaid, as well as debts previously incurred, and these defendants have recovered a judgment thereon against said May L. K. Carter in the New Jersey Supreme Court for the sum of four thousand seven hundred and sixty-three dollars and eighty-five cents, which judgment was recovered on the fifth day of December, nineteen hundred, and execution was issued thereon on the sixth day of December last, and levy was made upon the premises described in said mortgage.

And these defendants further answering say that by the said judgment, execution and levy they have acquired an interest in the premises in the bill of complaint described, and by reason thereof have been admitted as defendants in this cause, and they deny that the sum of three thousand dollars, or any other sum is due the complainant on said mortgage, and that the mortgage and estate have become absolute in the complainant, and that it is not true that the complainant as trustee has applied to himself and his wife to pay the mortgage, but on the contrary they aver that the said mortgage has been satisfied and has been delivered up to these defendants, and is now in their possession with instructions thereon written by the complainant himself to the County Clerk to cancel the same of record, and that the complainant is not entitled to hold the same as a lien against the premises in which these defendants have acquired a lien, nor to a decree for the foreclosure of the mortgage, or a sale of the premises as against these defendants.

And by way of cross bill these defendants aver the facts hereinbefore set forth, and also say that after giving the said mortgage up to these defendants with directions to the County Clerk to cancel the same of record, the said George F. Carter, without notice to these defendants, sent a written notice to the County Clerk, dated September twenty-sixth, nineteen hundred, describing the bond and mortgage and directing him not to cancel it, except upon the same being produced by him in person, or by a discharge duly acknowledged by him, and he declared in said notice that the mortgage was held by him as trustee, and was still unpaid, and he caused the said notice to be recorded

in the Clerk's Office of Union County on the margin of the record of the mortgage, by reason whereof, the County Clerk is unwilling to cancel the mortgage, and these defendants are embarrassed in enforcing the lien of their judgment on said lands, which are not sufficient security for the judgment if it be subject to the mortgage.

And these defendants charge and insist that the mortgage was in fact paid when the premises were purchased by May L. K. Carter, and that if any trust was made in favor of the children, Frank E. and James B. Carter, it was wholly voluntary and without consideration, and that it was kept alive, not for the benefit of the children, but for the purpose of protecting the property of May L. K. Carter, against her creditors, and that the mortgage was in law and in fact satisfied when it was delivered by the said George F. Carter, trustee, to these defendants, and that if the said infants had any interest in it at that time they must look to their trustee for redress, and are not entitled to enforce the mortgage as against the lands in which these defendants have acquired a lien, or to have the mortgage remain uncanceled of record.

And these defendants by way of cross bill pray that the said George F. Carter, trustee, may be directed to withdraw his notice to the clerk not to cancel the mortgage, or else to execute and deliver a discharge thereof, and that it may be decreed that the mortgage has been satisfied or else that it may be postponed to the lien of the judgment and execution of these defendants, and that the right of the defendants, Frank E. and James B. Carter, therein, if any they have, are subject to the

lien of the judgment and execution of these defendants on the mortgaged premises.

A. Q. KEASBEY & SONS,  
*Solicitors.*

EDWARD Q. KEASBEY,  
*of Council.*

Verification in the usual form.

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REPLICATION. AND ANSWER TO CROSS *Bill*  
RULE.

The complainant joins issue on so much of the answer of the defendants, William M. Rolston, Walter A. Bass and Edwin S. Hooley, as is not in the nature of a cross bill, and as to that part of said answer which is in the nature of a cross bill, he says:

1. Denies that the bond and mortgage set out in the bill of complaint herein were paid at the time the mortgaged premises were purchased by and conveyed to the defendant, May L. K. Carter, or that no trust was in fact created in favor of the defendants, Frank E. Carter, and James B. Carter, the complainant's children, and alleges the contrary thereof to be the truth, and that the said premises were purchased and conveyed expressly subject to said mortgage, as will more fully appear by the deed conveying the same to said May L. K. Carter, reference whereto is hereby made for greater certainty; he admits that the trust created was on his part voluntary and without consideration, but denies that the

said bond and mortgage were or are subject to his disposition and control without receiving due, full and adequate consideration therefor, or were or are kept uncanceled of record for the purpose of protecting the property of his wife, the defendant, May L. K. Carter, against the claims of creditors, and alleges that at the time said premises were conveyed to his wife and said bond and mortgage were assigned to him as trustee, his wife was not indebted to the said defendants, or to any other person or persons, and that up to that time she had never had any dealings or business transactions with said defendants.

2. Admits that at the time the said bond and mortgage were assigned to the complainant, as trustee for his children, the complainant was in a way indebted to the said defendants, to wit, for monies paid by them for certain stocks purchased by them for his account as brokers, but alleges that the market value of the stocks then held by them as collateral and security therefor largely exceeded the amount of his said indebtedness to them, and that if said stocks had been sold at that time at the then current market prices therefor, there would have been a large balance of money in favor of the complainant in the hands of said defendants, and that in reality he was not then indebted to them; and he further alleges that any and all indebtedness, which the complainant owed to the defendant secured as aforesaid, at the time the said mortgage was assigned to his as trustee, has been fully paid and satisfied, and that no part of the same is now due and owing, and that the indebtedness of the complainant to said defendants now existing has been entirely contracted and created subse-

quent to the date of the said assignment of said bond and mortgage to him as trustee; he admits that he has stated to said defendants that his wife, the defendant, Mary L. K. Carter, was the owner of said mortgaged premises, but denies that he ever stated that said premises were free of encumbrance, or that he made such statement at the time his wife opened an account with said defendants, or prior thereto, or that he obtained credit for her by any such statement; he admits that, on or about the eleventh day of January, A. D., 1900, he produced the said mortgage and the assignment thereof to him as trustee, and that he made the endorsement on said mortgage, and delivered the same with said assignment to said defendants as set out in the said answer of said defendants, but denies that he assured them that said mortgage had ever been paid or satisfied; he alleges that, at the time he made said endorsement and delivered said mortgage so endorsed and said assignment to said defendants, he acted under the belief that, as he had furnished the purchase money therefor, that he had the right and power to cause the same to be cancelled for his own purposes and benefit, but that he has since been advised by counsel that he had no power or legal right whatever to authorize the cancellation of said mortgage without due and adequate consideration being given and paid therefor, that the same was vested in him as trustee for his children, and that he had no right title or interest therein except as such trustee, and that said defendants knew all the circumstances connected with the purchase of the said premises and the existence and assignment of the said bond and mortgage to the complainant as

trustee for his children, or should have known them, as they were matters of public record; and he charges and insists that they took said mortgage endorsed as aforesaid and the said assignment, with full knowledge and information that this complainant had no power or authority to make said endorsement on said mortgage, or to deliver the same so endorsed and said assignment to them, and that such acts on his part were absolutely illegal, *null* and *void*, and that the transactions had by either himself or his said wife with said defendants would not and did not in any way or manner affect said bond and mortgage.

3. Admits that he and his wife are indebted to the said defendants, and that said defendants have recovered a judgment against his said wife, and issued execution thereon, and made levy under said execution in the manner and as is set out in said answer of said defendants.

4. Admits that said defendants have by said judgment, execution and levy acquired an interest in the said mortgaged premises, but charges and insists that such interest is subject and subsequent to the lien of said mortgage held by him as trustee for his children, and should be so decreed, and that the same should not be paid and satisfied out of the proceeds of the sale of said mortgaged premises until after the said mortgage to this complainant as trustee has been fully paid and satisfied.

5. Admits that, after having been advised of his duties and authority as the trustee of his children as aforesaid, he sent a written notice to the Clerk of Union County to the effect and as set out in the answer of said defendants, and he has been informed and verily believes that on account of such

notice said clerk refuses to cancel said mortgage on the record of said county.

6. Alleges that, at the time he purchased said mortgage, he had ample means of his own, over and above all his indebtedness and liabilities, so to do without injury or wrong to any then existing creditors, including said defendants; that he purchased the said mortgage for the sole benefit and use of his children, and had the same assigned to him as their trustee, and that he still holds said mortgage as such trustee, and that neither he nor his wife, nor any other person or persons than his said children have any right, title or interest therein.

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#### ANSWER OF INFANTS TO CROSS BILLS.

The answer of Frank E. Carter and James B. Carter, infants, under the age of twenty--one years, by Lewis A. Thompson, Clerk of the Court of Chancery of the State of New Jersey, their guardian, to the answer of William H. Rolston, Walter A. Bass and Edwin S. Hooley, defendants, in the nature of a cross bill.

These defendants, answering by their guardian, say that they are strangers to all and singular the matters and things in the said answer in the nature of a cross bill contained, otherwise than that these defendants are informed that their father, George F. Carter, purchased the bond and mortgage described in the bill of complaint, and took the title thereto in his name as trustee for them, and that he now holds said bond and mortgage as their trustee and for their use and benefit, and not otherwise;

and these defendants, being infants of tender years submit themselves to the judgment of this honorable court, and pray that their interest may be protected and saved to them.

LEWIS H. THOMPSON.

*Clerk. Guardian.*

Verification in the usual form.

## IN CHANCERY OF NEW JERSEY.

BETWEEN,

GEORGE F. CARTER,  
*Complainant.*

AND

MAY L. K. CARTER AND OTHERS.  
*Defendants.*

Transcript of shorthand notes taken before His Honor, Eugene Stevenson, Vice Chancellor, at the Chancery Chambers, Jersey City, July 9, 1901.

*Appearances:*

Mr. Edward A. S. Man for complainant;

Mr. Edward Q. Keasbey and Mr. Norbert Heinsheimer for defendants.

Mr. Man—I offer the instruments as they were recorded: First is the mortgage of Leona Pentz and Wm. E. Pentz, her husband, to the Central New Jersey Land Improvement Company, dated April 16, 1894:

(Marked C. 1.)

And an assignment of that mortgage by the Central New Jersey Land Improvement Company to Jane Man, dated January 6, 1899, and acknowledged January 6, 1899:

(Marked C. 2)

*Assignment* of the same mortgage, by Jane Man to Geo. F. Carter, trustee for Frank E. Carter and James B. Carter, dated February 21, 1899, and acknowledged March 10, 1899:

(Marked C. 3)

*Warranty Deed* conveying the mortgaged premises, Lena Pentz and Wm. E. Pentz, her husband, to May L. K. Carter, dated 21st of February, 1899, recorded in Book 348 of Deeds, pp. 27 &c., of Union County:

(Marked C. 4)

George F. Carter, called on the part of the complainant, and sworn:

*Direct examination by Mr. Man:*

Q. You are the complainant in this action? A. Yes, sir.

Q. As trustee for the two children, Frank E. Carter and James B. Carter? A. Yes, sir.

Q. You took the assignment of a certain mortgage executed by Leona Pentz and husband to the Central New Jersey Land Improvement Company, did you not? A. Yes, sir.

Q. At the time you took the assignment of the mortgage was there a bond that accompanied it? A. Well, I presume there was, but while I have made a thorough search I have not been able to find that bond.

Q. No; but at the time the assignment was made

to you? A. Yes, sir, there was a bond; I am quite certain there was.

Q. Have you got that bond in your possession now? A. No, sir.

Q. Have you searched for it? A. Yes, sir, I have.

Q. Have you been able to find it? A. No, I have not.

Q. You don't know where it is? A. I have no idea where it is.

Mr. Man—The bond is recited in the mortgage anyway.

Q. Can you state what interest is now due on this mortgage, from what date? A. I think the interest is due from the time the title, the house, was passed—20th or 21st of February, 1899.

Q. None has been paid to you since that time? A. No.

*Cross-Examination by Mr. Keasbey:*

Q. You paid no interest on that mortgage; neither you nor your wife paid any interest on it? A. No; I paid no interest on it.

Q. No interest was paid? A. No interest was paid.

Q. The title was in the name of your wife? A. Yes, sir.

Q. And she paid no interest on it? A. No.

Q. I show you the mortgage, Exhibit C. 1, and call your attention to an endorsement on the back of it in blue ink, and ask whether that is in your handwriting?

Mr. Man—I object to the question on the ground that I offered the mortgage in evidence without the endorsement. That is a matter of defence I think.

The Court—And that is all that is in evidence, the instrument that you offered; but you produce this instrument, and there appears an endorsement upon it, and it is proper for the defendant to cross-examine in regard to that endorsement.

Q. (Question read). A. Yes, it is.

Q. I show you the assignment which is marked Exhibit C. 3, and call your attention to an endorsement on the back, and ask whether that is in your handwriting? A. Yes, sir.

Mr. Keasbey—I offer those endorsements in evidence.

Mr. Man—I object to their going in at present.

The Court—They are sufficiently identified; at the present time it is not proper to admit them; they may be offered when the defendants come to introducing evidence on their side.

Q. When was that endorsement written on the paper—the day of its date? A. On the 11th of January, 1900.

Q. That is the date that is written in? A. Yes, sir.

Q. And in the office of Rolston & Bass? A. I think it it was.

Q. You had an account with Rolston & Bass, had you not?

(Objected to; objection overruled.)

Q. You had been carrying on an account with them for some time in their office in New York, had you not? A. Yes, sir.

Q. And you were in debt to them in a large sum, some fifty thousand dollars? A. Yes, sir.

Q. And they had urged you to pay off or reduce that indebtedness? A. No, sir.

Q. You had in fact drawn out some money from them just shortly before this, hadn't you? A. Shall I answer that?

Q. And you were asking them to continue that account in January, 1900? A. Well, I think I will have to ask you to explain that question.

Q. You were asking them to let you go on with your account and not to sell your securities? A. No.

Q. Eh? A. When?

Q. In January, 1900? A. Why, certainly not.

Q. Eh? A. No, sir.

Q. They were urging you to reduce your account then, were they not? A. No, sir, they were not.

Q. Didn't Mr. Hooley tell you that you ought to make him more secure? A. No, sir.

Q. To give him further security? A. No, sir.

Q. Didn't he tell you that you had been dealing with some property and that you ought not to deal that way, but that you ought to take care of him first? A. No, sir.

Q. What did he say? A. What time do you refer to?

Q. At the time this receipt was given—January, 1900.

A. Oh, well, that is a different question; I thought you were talking about some other time; I thought you were going back—you first started out to ask me about the winter of 1899, January and February, 1899.

Q. No, I refer to early in 1900? A. You didn't start out that way.

Q. Well, in the winter of 1900—January, 1900, was not Mr. Hooley asking you to reduce your account, or to give some security? A. Well, I don't recall any such request.

Q. Didn't he come to you and say something about your having disposed of some property, or made some transaction in regard to it? A. Yes, sir, he did that.

Q. And didn't he insist that you were pretty largely in debt to him? A. Yes, sir.

Q. And that you ought to do something to take care of him? A. No, I don't remember that he said that.

Q. Well, didn't he say that?

Objected to. Objection overruled.

Q. That you had some dealings with some property over in New Jersey? A. That I was dealing with it?

Q. Didn't he tell you that you were disposing of some property, or doing something with some property over there, and that you ought to take care of him? A. Do you want me to state exactly?

Q. Yes, of course that is what I want to get at: don't keep looking at your counsel. A. Well, my

recollection of it is that Mr. Hooley asked me to call on him——

Q. To come and see him? A. To come and see him, yes; and he stated that he had learned that I had placed a mortgage on the property: he said in the state of your wife's account that won't stand for five minutes. I endeavored to explain to him just how that transaction came about, that the assignment of the mortgage had been made nearly a year preceding. And he seemed to be pretty excited about it, and said it certainly would not stand: and I did my best to explain it to him, and I said that I would bring the papers to show him, that I could easily enough prove——

Q. Prove that there was nothing in it? A. To prove that the mortgage had been assigned to me in March, 1899, but that I hadn't had it recorded until the following fall, the fall of that year.

Q. You had the mortgage recorded in the fall?  
A. Yes, sir.

Q. And what else? A. Well, I think he said in effect that it was not treating them squarely; and as I remember, my reply to that was I had always tried to be perfectly square in my dealings with his firm; and that if he felt that I had not done so that I would do all in my power to make it right.

On the following day I got the mortgage and the assignment of the mortgage, and took it around to the office of Rolston & Bass, showed them to Mr. Hooley, showed him the dates on them, showed him that the dates bore out what I had stated to him the day before as to the date of the assignment, and so forth: and then I wrote the cancellation which appears on them, and handed the papers to Mr. Hooley. He at first refused to take them, said he

didn't want them; and I said that if he felt that I hadn't treated them squarely in the matter, that I felt that he could have them; and he said, very well, I will put them in the safe, but you need not worry about them; I will not trouble your wife about the property.

Q. Did you assign the mortgage to him? Did you give it to him as an assignment; what was your idea? A. No, I didn't give it to him as an assignment, I don't think.

Q. But you wrote on it that it was paid. What did you tell him? A. I didn't tell him anything more than what I have just stated.

Q. You showed him what you had written on it? A. I presume he saw that.

Q. You did this to make him feel that you were doing the square thing by him, you say? A. Yes, he said that he thought I hadn't done the square thing, and I wanted to right myself if he thought so.

Q. To show him that there was nothing on the property; that this mortgage was not on the property? A. The mortgage certainly was on the property.

Q. But that it was no longer on it; you gave it to him to show him that: He was complaining of your holding a mortgage on the property, wasn't he? A. Yes, sir.

Q. And you gave him this to show that it was not any longer on it? A. Well, I presume so.

Q. You presume so. You didn't assign the mortgage to him, you say? A. No, I didn't assign the mortgage to him.

Q. You wanted to show him that there was nothing on it. Your wife had the property in her

name, and the account was in her name? A. Yes, sir.

Q. And there was an account in your name too? A. Both.

Q. And what did her indebtedness amount to at that time? A. I can't tell you.

Q. Fifty thousand dollars? A. No, sir.

Q. A joint account was it? A. No, sir.

Q. A separate account? A. Yes, sir.

Q. And then you gave him this mortgage with that assignment on it, to show that there was nothing on the property at that time, and that he need not be afraid? A. I don't know that I can properly answer that without making a rather long explanation.

Q. Make any explanation you see fit. A. I had an account there, and my wife had an account there, and on my own account I did owe them money for some months: my wife's account hadn't stood so long. Mr. Hooly had constantly told me that he would look after those, that I needn't worry about them; and I felt every assurance that he would carry out what he said he would do; and I suppose for that reason, when he spoke to me about this mortgage and said that he thought *I was not doing right*, I handed him that cancellation in order to prove that I wanted to deal squarely with him. I don't know whether that answers the question or not.

Q. You mean it was in order to prove that your wife had this property and that this mortgage was no longer to appear; is that what you mean? A. I suppose that was my intention, yes, sir.

*Re-Direct by Mr. Man:*

Q. How long had you been dealing with the firm

of Rolston & Bass? A. Oh, for a good many years, possibly a dozen or more.

Q. And you were dealing with them in the winter of 1898 and '99? A. Yes, sir.

Q. Were your transactions with them large, or how? A. I really don't know; I don't suppose I was a very large borrower.

Q. Well, there were a considerable number of transactions? A. Yes, sir, a good many.

Q. A good many shares of stock bought and sold? A. Yes, sir.

Q. Now in the beginning of the year 1899 what was the state of your account with them—in your favor, or against you? A. In my favor.

Q. In the latter part of December, 1898, and in January, 1899, was the balance in your favor? A. Yes, sir.

Q. Did you draw out from that firm during those two months any considerable sum of money? A. Well, I drew out from them early in January about \$5,000.

Q. Can you give the dates, and the amounts that you drew out? A. No, I can't give the dates—

Q. I hand you what purports to be statements of account, Rolston & Bass in account with yourself, and ask you what they are? A. Well they are accounts rendered me by Rolston & Bass.

Q. Can you state from those accounts of money that you drew out from your account in Rolston & Bass, prior to—from the beginning of the year and prior to the 21st day of February? A., Yes, sir. Well it appears from this account that I drew out on the 10th of January two thousand dollars.

Q. Give the year. A. 10th of January, 1899, \$2,000. On the 12th of January, 1899, \$2,500; and on the same day apparently another cash item of

\$219.36; on January 17th, \$125; on January 14, \$10; on January 20, \$67.17.

Q. What year? A. 1899; on the 1st of February, \$25. I think that is all up to the 21st of February.

Q. For what purpose did you draw this money out? A. I drew it for the purpose of buying a house.

Q. And you made a purchase of a property? A. Yes, sir.

Q. Shown by deed, exhibit C. 4? A. Yes, sir.

Q. How did you pay for that property? A. I paid \$100 to bind the contract, and \$4,700 on the passing of title.

Q. To whom was the \$100 paid? A. That was paid to Mr. William E. Pentz.

Q. And the \$1,700? A. And the \$1,700, the check was to Leona Pentz.

The Court: He spoke of \$4,700.

Mr. Man: I know; we will come to that.

Q. I show the witness two checks: they paid the \$100 and the \$1,700? A. Yes, sir.

Q. Those checks have been paid and returned to you? A. Yes, sir, they have.

(Said checks offered in evidence: the one for \$100, dated February 7, 1899, to the order of W. E. Pentz and signed George F. Carter, marked C. 5; the check for \$1,700, dated February 15, 1899, marked C. 6.)

Q. To whom were the other remaining three thousand dollars paid? A. That was paid to Miss Jane Man.

Q. For what? A. Well, I believe she held the mortgage.

Q. She held the mortgage? A. Yes.

Q. (Showing witness another check) : Was that the check that was given to her? A. Yes, sir.

Q. That check is to your order, a certified check, endorsed by you to her? A. Yes, sir.

Q. And with her endorsement on, and that passed through the bank and was paid? A. Yes, sir, evidently.

(Said check of \$3,000 offered in evidence and marked C. 7.)

Q. Please state what was done by you and Miss Man and others on the 21st day of February when the title was passed, in regard to the mortgage, stating the exact transactions which took place in regard to the mortgage which has been placed in evidence. A. Well, on the 21st of February, when the title was passed and the money was paid for the property I received a deed drawn to Mrs. Carter, drawn in her favor, and also a satisfaction piece from Miss Man—that is, a satisfaction of the mortgage.

Q. (By the Court) : You mean satisfaction of the mortgage, or assignment? A. No, satisfaction piece for the mortgage. That took place in the office of the Secretary of the Land Improvement Company, Mr. George Kyte. After the transaction was completed Mr. Kyte and I went out to Fanwood together. On our way out he suggested to me that to secure the property more properly it would be better to have an assignment of that mortgage made to myself as trustee for my two infant children; and we talked it over going out; and the idea seemed to me a good one: and I think that evening Mr. Kyte came around to the house, and we talked it over with my wife and myself; and it was finally decided to put the property in that

shape. He said that he would see Miss Man at the earliest opportunity and have her execute an assignment of the mortgage to me. That was done on the 10th of March.

Q. (By Mr. Man): Had you told your wife that you were going to take the property free and clear, prior to your taking it? A. Well I think—yes, I think so; my first intention was to have it free and clear, and put it in her name.

Q. And then after you say you got the title, that evening on consultation with her and Mr. Kyte you determined to take an assignment? A. Yes, sir.

Q. That would put the mortgage on? A. Yes, sir.

Q. Did she consent to that? A. Yes, sir.

Mr. Keasbey: I object to evidence of a verbal consent after the property had been conveyed free and clear. It would not revive the mortgage.

The Court: We will deal with that afterwards.

Q. You received from Mr. Kyte the assignment of the mortgage that has been placed in evidence here? A. Yes, sir.

Q. And you subsequently had it recorded? A. Yes, sir.

Q. Was the satisfaction piece ever recorded. A. No.

Q. That was, as I understand it, done away with? A. Yes sir.

Q. And the assignment taken in its place? A. Yes, sir: destroyed.

Q. Before anything had been done, and with the consent of your wife? A. Yes, sir.

Q. At that time had your wife had any dealings with Rolston & Bass? A. No, sir.

Q. At the time that you bought this property and had the title taken in Mrs. Carter's name, and the assignment of the mortgage in your name as trustee for your children, were you indebted to Rolston & Bass? A. Well, in a way, yes.

Q. Just explain the nature of your situation with them? A. That is, on the 21st of February when the title was passed I was dealing with them; and I think that at that time I probably owed them in the neighborhood of \$55,000, but as an offset to that they were carrying stocks for me which at the market value at that time, that is if sold at the market value at that time, would have produced a sum sufficient to pay the indebtedness of mine to them and left a surplus in my favor. And the same is true on March 9th. I think that between those dates I had reduced my indebtedness to them to some \$26,000 or \$27,000, somewhere around there; and they were still carrying securities for me which if they had been sold at that time would have produced a sum more than sufficient to pay everything I owed them and left a surplus in my favor.

Q. Can you state what on February 20th in the way of stocks or bonds they held of yours as collateral? A. On February 20, 1899, they held ten shares of Consolidated Ice, common; 100 shares of Pacific Coast Company, second preferred; 100 shares of People's Gas Company of Chicago; 100 shares of Mobile & Ohio; 100 shares of St. Louis Southwestern, preferred; 100 shares of Interna-

tional Paper Company, common; 200 shares of Federal Steel; 50 shares of New York Air Brake; \$5,000 of St. Louis Southwestern second mortgage bonds. That was all.

Q. You were dealing in stocks there with them?

A. Yes, sir.

Q. And in those stocks a great deal? A. Yes, sir.

Q. Did you keep track of the market rates of the stocks? A. I tried to; I presume I did.

Mr. Keasbey: I object to the competency of this witness as an expert on the value of stocks.

The Court: I will take it for what it is worth.

Q. Have you looked at any of the papers giving the quotations about that date? A. Yes, sir, I have examined the Financial Chronicle.

The Court: Oh, you can't prove the value of securities on that day in that way, Mr. Man. If he was keeping track of the market at that time he can refresh himself in any way he pleases.

Q. What is the Financial Chronicle? A. I think it is a financial paper giving general financial news, and it is usually kept in all the brokers' offices as a reference. I think every broker's office I have ever been in has kept that as a reference, and will refer to it on any question as to prices.

Q. From your recollection of the sale on those dates and of the market price as refreshed by looking at the Financial Chronicle, will you please state

the values of those stocks on the dates you have mentioned?

Mr. Keasbey: He must give it in detail.

Q. Item by item. A. The Consolidated Ice was worth—

Q. And in stating the percentage of value that they were quoted at, also state what the value of the stock would be? A. The Consolidated Ice was worth about 46; the ten shares would be worth \$460. The Pacific Coast, second preferred, was worth about 67; that would be worth \$6,700 for the 100 shares. People's Gas Company was worth 116; 100 shares, that would be \$11,600. The Mobile & Ohio was worth 40; 100 shares, worth \$4,000. St. Louis Southwestern, worth 30 1-2; 100 shares would be worth \$3,050. International Paper, common, was worth 62; 100 shares would be \$6,200. Federal Steel preferred was worth 88; 200 shares would be worth \$17,600. The New York Air Brake was worth about 150; 50 shares would be \$7,500. The St. Louis Southwestern, second mortgage bonds, \$1,000 each, were worth 54; five of them would be worth \$2,700.

Q. And what is the total value of those securities as you find it on that day? A. \$59,810.

Q. And the indebtedness on that day was what? A. Well, as nearly as I can figure it from their statement, \$55,014.86.

Q. And that would leave, if they had been sold out a balance to your credit of how much? A. \$4,795.14.

Q. Have you examined the accounts rendered by Rolston & Bass to ascertain what those securities actually were sold for? A. Yes, sir.

Q. Please state what each one of those securities was sold at, and the date when they were sold?

A. The Consolidated Ice was sold on the 11th of May, 1900, for 39, less commission, amounting to \$388.55. The 100 shares of Pacific Coast Company were sold on the same day, May 11, 1900, for 57, and less commissions brought \$5,685.50. The People's Gas was sold on March 8, 1899, at 112; less commissions it brought \$11,185.50. Mobile & Ohio sold on March 8, 1899, at 37 1-2; less commissions brought \$3,735.50. The St. Louis Southwestern was sold March 8, 1899, at 27 1-2; less commissions it brought \$2,735.50. The International Paper, common, sold on May 9, 1899, at 49 1-2; brought, less commission, \$4,910.50. 100 Federal Steel sold on March 8, 1899, for 87 1-4, which, less commission, produced \$8,710.50. Another 100 Federal Steel preferred sold on March 8, 1899, at 87 3-8, which, less commission, brought \$8,723. The New York Air Brake sold on April 25, 1899, for 195, which, less commission, produced \$9,742.75. The St. Louis Southwestern second mortgage bonds were sold on March 8, 1899, at 51 1-2, which, less commission, brought \$2,568.

Q. Now what is the total amount realized by Rolston & Bass from the sales of those securities?

A. \$58,386.05.

Q. And was that in excess of the amount of the indebtedness as appeared on their books at that time, and if so how much? A. That was in excess of the indebtedness of me to them on the 21st of February by the sum of \$3,371.19. The amount they sold for was greater than the indebtedness by \$3,371.19.

Q. Now on March 9th, at the time that the as-

signment was executed, as appears by the acknowledgment on it, will you state what securities Rolston & Bass held of yours as collateral? A. Ten shares of Consolidated Ice, common; 50 shares of New York Air Brake; 100 shares of International Paper, common; 100 shares of American Tin Plate Company, common; 100 shares of American steel & Wire Company, common; 100 shares of Pacific Coast Company, second preferred. That was all.

Q. Now will you state the values of those stocks on that date. A. The market value of the Consolidated Ice was 47 1-2, which would have produced \$475.

The market value of the New York Air Brake was 160; 50 shares would have produced \$8,000.

100 shares of International Paper, common, worth 54, would have produced \$5,400.

100 shares of American Tin Plate Company, common, worth 40, would have produced \$4,000.

100 shares of American Steel and Wire Company, common, worth 64, would have produced \$6,400.

100 shares of Pacific Coast Company, second preferred, worth 64, would have produced \$6,400. The total would have been \$30,675.

Q. Now will you state when, and for what, these securities were afterwards sold by Rolston & Bass. A. Do you not wish to get in the credit balance on that?

Q. Yes, what was the amount of the indebtedness at that time? A. \$27,613.63, as shown by a statement rendered to me on that date: and that would have left a balance to my credit if the securities had been sold at that time of \$3,061.37.

Q. Now state when and for what amount these securities were subsequently sold? A. The shares of Consolidated Ice, common stock, on May 11, 1900, at 39, which produced, less commission, \$388.55.

50 shares of New York Air Brake were sold on April 25, 1899, at 195, and produced, less commission, \$9,742.75.

The International Paper, common, was sold on May 9, 1899, at 49 1-4, and produced, less commission, \$4,910.50.

The American Tin Plate, common, 100 shares, was sold on March 15, 1899, for 43 1-4, which, less commission, produced \$4,310.50.

The 100 shares of American Steel & Wire Company was sold on March 10, 1899, at 64 1-4, and produced, less commission, \$6,410.50.

The 100 shares of Pacific Coast Company, second preferred, was sold on May 11, 1900, at 57, and produced, less commission, \$5,685.50.

The total amount for which those stocks were sold was \$31,448.30; and the indebtedness on the 9th of March, 1899, was \$27,613.63, which left a surplus of \$3,834.67.

Q. Have you put these figures that you have given in the shape of statements? A. Yes, sir.

Q. Are those the ones? A. That I handed to the stenographer.

Mr. Man: I offer these statements in evidence merely as a summary of what he has testified to.

The Court: For that purpose they may be marked.

(Marked C. 7 and C. 8, respectively.)

Q. Did you withdraw any cash from the firm of Rolston & Bass within a short time after this transaction of the purchasing of the house? A. Yes, sir.

Q. Please state when, and what amount?

A. Simply from my own recollection—

Q. Can't you look at their accounts? A. (Looking at statement): Yes, sir; I withdrew on March 10, 1899, \$350; on March 15, \$600; on March 16, \$10; March 29, \$40; March 17, \$50; March 24, \$25; April 3, \$4,010—

Q. That will do. When was it that you placed the assignment of the mortgage on record? A. October 3, 1899.

Q. What was the cause of the delay?

A. Well the cause of the delay primarily was that the assignment was not executed until about two weeks after the mortgage, so it didn't go on record with the mortgage; and I placed it in my pocket, intending to get off at Elizabeth some morning and have it recorded, but it didn't seem that I ever could conveniently take the time to do it; I carried it in my pocket for some length of time, and took it out and, I think, put it in a bureau drawer; and then saw it there one day, and put it in there again; and thought I would have it recorded, but again didn't seem to find time; and finally, I think the latter part of September, or, possibly, just about the 1st of October, Mr. Kyte was at the house one evening and I asked him if he would take it and have it recorded for me. I knew his son was in the sheriff's office, and that he could do it without any inconvenience.

Q. Now at the time this property was deeded to your wife I understand you to say that she had up

to that time no dealings with Rolston & Bass? A. No, sir.

Q. Was she indebted at that time to them or to any other person, to your knowledge? A. *No, sir*; not to any person.

Q. When was her account with Rolston & Bass opened? A. I believe it was on the 13th of April, 1899.

Q. Who opened that account? A. I did.

Q. By making a deposit with them? A. Making a deposit as collateral of \$2,000. Georgia Central 5 per cent, mortgage bonds.

Q. (Showing witness paper): Is that the receipt for the amount that you opened her account with?

A. Yes, sir.

Q. Whose bonds were they? A. They were mine.

(Said receipt offered in evidence and marked C. 9.)

Q. Did you subsequently furnish any further margin for this account of your wife?

A. Yes; I think about June, 1899, I gave them a small amount of additional margin; I can't recollect just what it was, not very much, a few shares of International Paper, common, and one or two other stocks I think, but not of very great value; and I think I said at the time to them that that was all the security she could furnish them on that account.

Q. And that was in June? A. My impression it was in June, or the latter part of May; but about the 1st of June.

Q. Had you ever at any time, for the purpose of obtaining credit for your wife, or for any other purpose, made a representation to Rolston & Bass

that the property purchased by you from Mrs. Pentz was free of incumbrance? A. No, sir.

Q. Now in regard to what was set up in the answer, notice to the Clerk of Union county not to cancel the mortgage except presented by you or by duly executed satisfaction piece. How did that come to be made? A. I was advised by counsel that I had no right to make such cancellation of the mortgage; that I had received no actual consideration for the mortgage; and acting on that advice I did notify the Clerk of the County of Union not to cancel the same of record.

Q. What do you mean by no actual consideration? A. I mean that I had received no money from anybody for it. Q. Do you mean that you yourself personally received no money, or you yourself as trustees?

Objected to as leading.

Q. (By the Court) Just explain what you meant when you spoke of your not having received any actual consideration. A. I mean for the cancellation of the mortgage; I had received no consideration of any sort as trustee for those children.

Q. Had you received any consideration otherwise than as trustee? A. I don't know; I don't think I have; I don't consider I have.

Q. Did you receive credit? A. Not that I know of; I never asked for any.

Q. (By Mr. Man) And did you cause a notice to be given to Rolston & Bass requesting them to deliver the mortgage back to you? A. Yes, sir.

Q. How did you come to do that? A. I did that by the advice of counsel.

Q. Who was the counsel? A. Mr. Abbett, of the firm of Manice, Abbett & Perry, I think the firm is.

Q. Was the mortgage and the assignment returned? A. No, sir.

*Re-Cross by Mr. Keasbey:*

Q. Now with regard to your account with Rolston & Bass; it was a running account, was it not?

A. Yes sir.

Q. There were a good many intermediate transactions beside those you have spoken of; a good many other securities besides those you have mentioned? A. Yes, sir.

Q. That were bought and sold from time to time? A. Certainly.

Q. It was continually changing account, with securities held as collateral? A. Yes, sir.

Q. Bought and sold for your account? A. Yes, sir.

Q. And you were charged with the amount that was paid for them, and credited with the proceeds? A. Yes, sir.

Q. And the securities were held as collateral? A. Yes, sir.

Q. From time to time? A. Yes, sir.

Q. And it was an account current; and there were other securities besides these? A. Well, not on the days I have testified to; on other dates.

Q. And you drew money out; and all of these securities might have been sold at any time on your order? A. They might have, certainly.

Q. And it depended entirely on you when they should be sold? A. Oh, certainly.

Q. And the account closed with an indebtedness of some six thousand dollars against you?

A. I believe it finally did so close.

Q. And your indebtedness to them in February, 1899, was over \$50,000, with some collaterals? A. Yes, sir.

Q. And the prices you have given you have taken from a newspaper called the *Chronicle*? A. My recollection is refreshed by what I see there in the *Financial Chronicle*.

Q. And what was the price of Federal Steel on February 23d, at 12 o'clock? A. I could not tell you what it was at that hour; but about that time Federal Steel was selling at 87 or 88, or somewhere around there.

Q. Or at 89, or possibly 86; and there was a variation in the price of these bonds and stocks from day to day, was there not? A. Yes, sir, certainly.

Q. And some times a variation of five points from day to day, in some of the stocks? A. Well I think about that time there were five-point advances in stocks at times.

Q. And there were variations at different times in the day- A. Yes, sir.

Q. And the prices you have taken from the *Financial Chronicle*, are they the highest or the lowest? A. I think in most cases I took the lowest.

Q. Can you find any case where you took the lowest? A. The *Financial Chronicle* will show.

Q. But you don't know whether you took the highest or the lowest of any particular stock? A. I could tell by looking at it.

Q. You didn't take the lowest in every case? A. No, I don't think so; I think possibly in one or two cases I took the highest, but in the majority of cases I took the lowest.

Q. Did you look at any other paper beside this?

A. No, sir; but as corroborative to that I had a good many statements from Rolston & Bass, statements of stocks purchased and sold at different times about that time.

Q. And stocks vary several points? A. They vary slightly.

Q. And one of the objects of your dealing is to take advantage of the variation in the price of the stock and make money on it, and you sometimes lose on it? A. Yes, sir.

Q. And you keep up a margin of, say, ten per cent., and if you fall below that your securities are liable to be sold at any time? A. That depends a good deal on your broker.

Q. This dealing is somewhat hazardous? A. Yes, I think it is.

Q. And it was continuous; you went right on until after your wife's account was opened? A. Yes.

Q. And your wife's account was opened while yours was running. A. Yes, sir.

Q. And why did you put an account in your wife's name? A. Well I think that my reason for doing that was that other men who were trading there had more than one account running. That is what I heard from them; of course I could not state it as a fact, but that is what influenced me possibly. I had drawn out some money from the firm, and purchased securities with it, and I just thought I would take a portion of those and start an account in her name.

Q. You could get better credit if you had two accounts perhaps? A. No, not at all; no such idea.

By the Court:

Q. Was anything drawn out of your wife's account? A. Yes sir, some small sums.

Q. How? A. By checks.

Q. From Rolston & Bass to your wife's order?

A. Yes, sir.

Q. And then you took those checks and she endorsed them? A. Yes, sir.

Q. And you collected them? A. No, I think she deposited them in bank.

Q. To whose credit? A. Her own credit.

Q. You treated this account as her account, did you? A. Yes, sir.

Q. She got all there was in it? A. Yes sir, that was my intention.

Q. How much money was drawn out of it altogether? A. Not a very great deal; I think about three hundred dollars.

Q. You are sure that she had all that money, are you? A. Certainly; I handed it to her, and she endorsed the checks.

Q. And used the money? A. She deposited it to her own credit.

Q. And used the money? A. Yes, sir.

Q. You didn't get it back in any form? A. No, I didn't get it back.

Q. When the account was closed I understand there was an indebtedness from your wife to the firm of Rolston & Bass, was there? A. Yes.

Q. And they sold the securities which you originally deposited? A. Yes, sir.

Q. So that there was a loss on that whole account; a very considerable loss? A. Yes, sir.

Q. You lost all you put in? A. And more besides.

Q. Less the \$300 that you drew out? A. Yes, sir.

By Mr. Keasbey:

Q. And when you bought that piece of land and

got a deed to your wife, you paid three checks, and the first one is February 7th, and the second and third February 15th, and that is the time the transaction was closed? A. February 15th? I possibly drew them a little ahead of the deed, in order to have them certified.

Q. They were dated the 15th? A. Yes, sir; I don't know about that.

Q. That date is correct—and stamped the 15th. A. That is correct then.

Q. And certified on the 16th was it not? A. Well, I don't know.

Q. Was it on that day that the transaction was closed? A. No, it was on the 21st of February I think.

Q. And on that day you took a deed for the property? A. Yes, sir.

Q. And you took the mortgage, and you took the satisfaction piece? A. Yes, sir.

Q. What did you do with the satisfaction piece? A. Why, I destroyed that after I got the assignment.

Q. When did you destroy it? A. I could not tell you the exact date; shortly after I got the assignment.

Q. You didn't destroy it at the time you got the mortgage: you got the deed and took the satisfaction piece home with you? A. Of course I didn't destroy it until I got the assignment.

Q. You got the assignment when? A. On the 9th or 10th of March.

Q. And that was dated on the 21st of February, but really acknowledged and executed on the 10th of March, wasn't it. A. Yes, sir.

Q. And you didn't destroy the satisfaction piece

until after you got this assignment? A. Why, no.

Q. And you had the satisfaction piece at the time you took the assignment? A. Yes, sir, of course I did.

Q. Now when did you destroy it? A. Well, as I say, I could not tell you the exact date, but it was shortly afterwards.

Q. After you got the assignment? A. Yes, sir.

Q. And you say it occurred to you that it would be better to have a mortgage to protect the title? A. To insure the property, yes.

Q. What do you mean by "protect the title"? A. Well, those were your words.

Q. I thought I used your words. A. Possibly so. My idea was to make the property as secure as I could for my wife and children.

Q. So that your wife and children should not be liable to loss in any way? A. Would have a home.

Q. That they should always have a home, and the mortgage should remain to prevent anything from getting it away from them? A. Yes, sir.

Q. And in case of any indebtedness of yours? A. I don't see how any indebtedness of mine could affect it one way or the other.

Q. In case of any indebtedness of your wife's? A. No; because my wife at that time had no indebtedness.

Q. But you wanted to make sure that your wife should never lose the property by reason of any indebtedness she might incur? A. Yes.

Q. And there was no other purpose in having the mortgage assigned? A. No, sir, that was the only purpose.

Q. That is all.

By the Court:

Q. What did you say was the purpose? A. The purpose was to secure the property absolutely as far as I could to my wife and children, to give them a home.

Q. Well, why would not that purpose have been accomplished if you had allowed the mortgage to be cancelled and the whole property vested in your wife, free and clear of any mortgage? A. Well, as I say, I had the assignment made under advice of Mr. Kyte; he said that he considered that would tie the property up more securely than in any other way, and in case my wife ever became indebted to anyone that it would at least save the mortgage for the children.

Q. Did I understand you to say that, after your wife opened an account with Rolston & Bass, in April, 1899, you kept on dealing with them? A. Yes, sir.

Q. When was your own account with them closed? A. I suppose it was substantially closed in the latter part of May, 1899; that is, without notice to me, they sold out some of the securities I had there, which left me indebted to them at that time in about the sum of \$2,000, and then they continued to carry certain stocks there for me.

Q. For you personally? A. For me personally.

Q. And how long? A. Well those stocks were afterwards sold out in May, 1900.

Q. May, 1899? A. 1900.

Q. Did I understand that your account was inactive from May, 1899, to May, 1900. A. Yes, sir; after they sold out a certain part of the securities I held there, the latter part of May, I don't think I had any further transactions.

Q. How about your wife's account that you opened in March or April, 1899, was that inactive in the year 1899? A. It was never a very large account; it was active in May and, possibly, June.

Q. And when was it closed out? A. I think in March, 1900.

Q. And that account also remained inactive from May or June, 1899? A. From the middle of June.

Q. From the middle of June, 1899, until May, 1900? A. I think so; at least, your Honor, I never gave any orders to buy or sell anything on either one of those accounts.

Q. Well, did your wife give any orders without you? A. No, sir.

Q. Did any one give orders that affected that account? A. Not that I know of.

Q. Do I understand that the deed from Mr. and Mrs. Pentz to Mrs. Carter, exhibit C. 4, which I show you, was delivered to you at the same time the mortgage from Mr. and Mrs. Pentz to the Central New Jersey Land Improvement Company, exhibit C. 1 was delivered to you with the satisfaction piece? A. Yes, sir.

Q. It was all one transaction? A. Yes, that was all one transaction.

Q. Where did it take place? A. in the office of the Central New Jersey Land Improvement Co., at 143 Liberty Street, New York.

Q. Mr. Kyte was the man that managed the transaction? A. Yes, sir, on my behalf.

Q. He attended to it for you? A. Yes, sir.

Q. Did you have any counsel there? A. No, sir; Mr. Kyte attended to it at the time.

Q. Was the assignment of the mortgage from the Central New Jersey Land Improvement Company

to Jane Man, Exhibit C. 2, also delivered to you at the same time? A. Yes, I think that was: yes, I presume that must have been handed to me with the rest of the papers.

Q. Do you recollect seeing any bond there at the time? A. I think not, no. I have not much recollection about that bond.

Q. Do you recollect whether there was a bond there with the seal torn off? A. No sir, I do not.

Q. You are sure that the instrument that was delivered to you to satisfy the mortgage was—that there was an instrument delivered to you to satisfy the mortgage? A. Yes; yes sir.

Q. And I understand you to say that you destroyed that afterwards? A. Yes, sir; I kept that of course until—

Q. Was that paper that you called a satisfaction piece something like this assignment in its appearance (showing witness one of the papers)? A. I think it was; I think it was on legal paper.

Q. And what was the purport of it; do you remember? A. Why, I don't know that I ever read it; I understood from the title of it that it was a satisfaction.

Q. Of the mortgage? A. Of the mortgage.

Q. And you don't recollect whether there was any bond there, or any receipt made on a bond? A. No sir; I have no recollection of that at all.

Q. You relied entirely upon Mr. Kyte to attend to these details in the regular way? A. Yes, sir.

Q. Is he here? A. Mr. Kyte is dead.

Q. How long had you known him?

A. Oh, I had known him for four or five or six years.

Q. How did he come to do this business? A. I

suppose he was one of my closest friends, and I knew that he had a very large acquaintance with real estate matters, in his position as Secretary of the Company.

Q. The Land Company had no interest in this transaction of any kind? A. Not at all; not at all.

Q. But nevertheless you met at Mr. Kyte's office?  
A. Yes, sir.

Q. He was secretary of the land company? A. Yes, sir, said he was something.

Mr. Man: He was secretary, treasurer, and manager.

Q. Did you meet Miss Jane Man in this transaction at all? A. I think she was there that day; I am pretty certain she was; she was there when the title was passed.

Q. (By Mr. Keasbey) Who is she? A. Mr. Man's sister, I think.

Q. (By the Court) Do you recollect whether Miss Man was there? A. Yes, sir, I recollect that she was there; no question about it.

Q. Did you give her this check at the time, Exhibit C. 7? A. Yes, sir, I did.

Q. Do you recollect whether she executed any paper there at that time? A. Well, I don't think she did.

Q. Do you think that any paper that she had to execute was already executed? A. I think it was; that is my recollection.

Q. Was this meeting in the day or evening? A. Between three and four o'clock in the afternoon.

Q. And who was there? A. I think Mr. Pentz and his lawyer.

Q. Who was his lawyer. A. W. H. Hamilton of Broadway.

Q. And who else was there? A. Mr. Kyte; Mr. William Barrett; Miss Man; and I think there was another lady with Miss Man, but I don't recollect her name; and I think their office boy or clerk was also there, and myself.

Q. Whereabouts was this office? A. Well, it is 143 Liberty Street.

Q. New York City? A. Yes, sir,; in the Central Building it is called, I think.

Q. Is that the office of this Central New Jersey Land Improvement Company? A. Yes, sir.

Q. It is the New York office? A. It is the New York office.

*Further Cross by Mr. Keasbey:*

Q. Before you had instructed the Clerk not to cancel the mortgage you had a letter from Mr. Heimsheimer, hadn't you? A. Yes, sir.

Q. And on the 25th of September, the day before you instructed the Clerk not to cancel it you had an interview with Mr. Heimsheimer? A. I may have had.

Q. As to the payment of this indebtedness, your wife's indebtedness and your own? A. I may have.

Q. Wasn't it true that on this September 25th the amount of the indebtedness was some five or six thousand dollars? A. yes, sir.

Q. And on the 25th of September you saw Mr. Heimsheimer, and it was the next day after this that— A. I don't know what day it was I saw him.

Q. It was before you gave that notice to the County Clerk? A. It is barely possible.

Q. Wasn't it? A. I can't say.

Q. Wasn't it that that suggested that to your mind? A. I have no doubt it was.

By the Court:

Q. When did you first conclude that you had no right to cancel this mortgage? A. I saw Mr. Abbett, I think, in May 1900, and stated the facts of the case to him, and asked him for his advice, and he then told me that I had no earthly right to make that cancellation.

Q. Did you go to him for advice in regard to your right to cancel the mortgage? A. Yes, sir, I think I did.

Q. Well, how did it come to enter your mind that you had no right? A. Well, I don't know how it came, I knew I was in debt—

Q. I mean this: that on January 11, 1900, apparently, you assumed the right to cancel this mortgage and acted upon the idea that you had full power to do so: now what first suggested to your mind that you, as trustee, had not the right to cancel that mortgage unless the money was paid to you as trustee? A. Well, I think that I should have known at the time that I made that cancellation that I didn't have the right, because as I recollect now when Mr. Kyte suggested the putting the papers in that shape he stated that the children when they came of age if they wished, could cancel the mortgage, I should have remembered that, and never have made that cancellation, and that possibly was in my mind afterwards.

Q. With whom did you have the transaction when you endorsed this receipt and made it? A. With Mr. Hooley personally.

Q. You had the transaction with him? A. Yes, sir.

Q. Anyone else? A. There were persons around the office, but I don't think that anyone else was right there at the time; we were alone in his private office.

Q. There is one thing that comes to my mind; I didn't quite understand your testimony: I think you said that Mr. Hooley made objection to this land transaction? A. Yes, sir, he did; he sent for me, and I went over to his office, and I saw him in his private office, and he said that he had found out that I had placed a mortgage on my wife's property, and he said, "George, you know in the state of your wife's account it will not stand a moment." And I tried to explain to him just how it was that assignment had been made, really about the time the property was purchased; and I said that I would get him the papers and show him by the papers that the assignment had been drawn in March, 1899, and that it was not a fresh transaction, and that I certainly did not put it on record with the intention of defrauding them.

Q. Had you told him that you had intended to make a gift to your children of this mortgage debt? A. I think I had; I think I tried to explain the transaction pretty fully to him; told him very fully that I had first intended to get the property free and clear, and acting on Mr. Kyte's advice had the mortgage assigned to myself as trustee for the children. He was quite excited at the time, and I don't think he took it in, or was willing to take in what I was telling him, or to believe it.

Q. Did he suggest that you cancel the mortgage? A. *No, sir; that was my own suggestion.* I said to him as I was walking out of the office, you have always found me perfectly square in my dealings

with you and I don't want you to feel differently, and I will do all I can to right matters if I have done what is not right.

Q. When you opened the account in your wife's name on April 13, 1899, did these brokers know that your wife had acquired this land? A. Undoubtedly they did, because I told Mr. Hooley before I purchased the house that I intended to purchase it.

Q. And intended to give it to your wife? A. Yes, sir; I think so.

Q. Was there any talk between you and the brokers, or their representatives, when you opened the account in your wife's name, about her having property? A. No, sir, none at all.

Q. Had you told them before that time that the land had been conveyed to your wife? A. Well, I can't say whether I had or not; I may have. I think very likely I did state in a general way—I was pretty intimate around there—and I think very likely I told them that I had bought the house and put in it in my wife's name, although I cannot state positively.

Q. Do you recollect telling them about what you paid for the house? A. Yes, sir; very likely I did.

Q. About \$4,800. A. I don't think I told them the precise figure.

Q. Did you tell them anything about there being a mortgage on it? A. Before I purchased it?

Q. Before or immediately after? A. No, I don't think I ever said anything to them about a mortgage; I may have.

Q. So far as you know when they opened the account in your wife's name they had a right to

suppose that your wife owned the property, free and clear? A. *Yes, sir.*

Q. And when this mortgage appeared on the record in September, that is what Mr. Hooley objected to? A. The assignment of the mortgage.

Q. When was there this talk with Mr. Hooley? A. On the morning of January 11, 1900—no, January 10—the date of receiving that cancellation.

Q. The assignment of the mortgage was recorded October 3, 1899? A. Yes, sir.

Q. Do you know how Mr. Hooley heard about this transaction? A. I have no idea how he heard about it.

Q. You say he was excited about it? A. Yes, sir, he was.

Q. Did you suppose that it was something he had just heard of? A. From his manner I should imagine it was; he may have seen it in some real estate records—

Q. Then he must have seen it in October? A. I know nothing as to how he saw it; he didn't explain that to me.

By Mr. Keasbey:

Q. Then you tried to assure him about it, that it was all right; told him the mortgage had been cancelled? A. Well, I can't say that I told him the mortgage had been cancelled; I said I will produce the mortgage and assignment, and said I wanted to do what was right, if he thought I hadn't; and that I would write that endorsement on it.

Q. *You told him that it had been paid?* A. *Yes, sir.*

Q. *What you meant was it had been paid at the*

*beginning?* A. No, sir, that was not my idea at all.

*That is all.*

By the Court:

Q. Did you have the mortgage and the assignment with you at the time of this conversation with Mr. Hooley? A. No, sir; they were in a box I had at the Liberty National Bank, Safe and Deposit Vaults.

Q. After you had this talk with Mr. Hooley what was the conclusion you came to—*that you would cancel it?* A. No, sir; that I would try and make it right and the following morning I went to my box and got the papers and took them out of the vault and showed them to Mr. Hooley; showed him the dates on them, *to bear out what I had told him* the previous day, as to when the papers were actually drawn up; and then I said I will write a cancellation on them, and I did that, and handed them to him, and *he at first refused* to take them, and I insisted on it, and I said if you feel that way I want you to take them; and he said all right I will take them and put them in the safe, but I will never bother or trouble your wife further about it.

Re-Direct by Mr. Man:

Q. When did you first meet me in regard to the foreclosure of this suit? A. I should say early in October, of 1900.

Q. Who introduced you to me? A. I think I was sent to you by Mr. Abbett; Mr. Abbett recommended you.

Q. Were you personally acquainted with me prior to that time? A. I don't think I was; I think I knew you by sight, but not personally.

Q. (By Mr. Heinshimer) Was that early in October, 1899? A. No, 1900.

By Mr. Keasby:

Q. At the time you went to Mr. Abbett and talked about the mortgage, that was after the last transaction in Mrs. Carter's account, was it not? That account was closed April 30? A. I don't know really when her account was closed, except it was in the spring of 1900.

Q. There is a balance of \$4,700 against your wife shown on the account; and you had a statement of it? I don't ask you whether it was right? A. I am not sure that I did.

Q. You had her accounts handed to you from time to time? A. Yes.

Q. And then after you received that statement you went to Mr. Abbett? A. I had a statement of an account dated April 30, or about April 30, 1899, and another one I think dated October 20, 1899.

Q. And didn't you have one of April 30, 1900? A. I haven't any recollection; I won't say that I didn't.

Q. You knew, when you went to Mr. Abbett, that there was a balance against Mrs. Carter's account? A. Oh, certainly, I knew that.

EDWARD A. S. MAN, called on the part of the complainant and sworn:

The witness: I am the solicitor of the complainant in this case. In January, 1899, I made a search against the mortgage offered in evidence in this case as Exhibit C. 1. This mortgage was assigned to my sister, Jane Man, by the instrument C. 2. I drew that instrument up. At the time that my sister received this assignment she also

received the mortgage C. 1, and a bond. The bond bore even date with the mortgage; it was from Leona Pentz and her husband, to the Central New Jersey Land and Improvement Company, and was in the penal sum of \$7,000; conditioned—

Q. (By Mr. Keasby.) Do I understand that you received it for your sister? A. I was present when she received it. It was conditioned for the payment of the sum of \$3,500 on or before April 16, 1896, with interest on the same at the rate of six per cent., payable quarterly; thirty days interest clause; and on the back of the bond were a number of endorsements of payments on account of interest; and also it appears that on December 31, 1895, the principal sum was reduced to \$3,000. Then there followed other payments of interest on the bond—I don't think I need go into detail; the last payment was on March 3, 1898, of \$35.

Q. Up to what date? A. That is up to January 6, 1899, that is the date of the assignment to my sister. There was then due on it, as you will see by that sum, three hundred and odd dollars of interest.

Q. (By the Court.) Then when your sister purchased it there was due \$3,000 of principal and some \$300 of interest? A. Yes, sir, the amount is mentioned in the assignment to her.

Q. Interest from what date? A. Payments were made partially on account—there is a covenant that the amount due was \$3,000, and \$365.58 of interest, up to the date of this assignment. The date of this assignment is 6th of January, 1899; and I at the time—

Q. That would be nearly two years' interest? A. The interest was way back, and the object of

my sister in taking the assignment was that the company didn't want to foreclose, and Mr. Kyte was a friend of us all, and asked her if she would not take an assignment of that mortgage, which she did, and she immediately notified Mrs. Pentz, and the interest was paid up; and then a short time afterward Mr. Pentz notified my sister that he had sold the property and desired her to be present when the title passed in order that the——

(Objected to as irrelevant.)

The witness: In regard to that satisfaction piece, I was not present, but merely drew it up, and there was a regular satisfaction piece.

Q. (By the Court.) Why did you draw a satisfaction piece; why did you not receipt the mortgage—have your sister receipt it; do you recollect? A. It merely was this, I didn't know whether my sister would be present or not; I expected to be present myself, and I had the satisfaction piece so that in case she was not present there that I could hand that over; and then if the thing fell through I didn't want to have the mortgage mutilated.

#### NO CROSS EXAMINATION.

In regard to papers marked C. 1 and C. 3, IT IS ADMITTED that demand was made on behalf of the complainant upon Messrs. Rolston and Bass for the return or surrender of those papers, on November 7, 1900, and that these two papers were produced to-day in court by counsel of Messrs. Rolston and Bass.

MRS. MAY L. CARTER, called on the part of the complainant, and sworn:

*Direct examination by Mr. Man:*

Q. The premises described in the bill of complaint where you live in Fanwood, were conveyed to you by Leona Pentz? A. Yes, sir.

Q. You are the May L. K. Carter described in the deed marked Exhibit C. 4, are you? A. Yes, sir.

Q. Prior to purchasing these premises was any statement made to you by Mr. Carter in regard to purchasing these premises?

Objected to.

Mr. Man: I will call her in rebuttal.

EDWIN S. HOOLEY, called on the part of the defendants, and sworn:

*Direct examination by Mr. Heinsheimer:*

Q. You were a member of the firm of Rolston & Bass in 1899 and 1900, were you not? A. I was.

Q. And you reside in Plainfield, N. J. A. I do.

Q. You know the complainant here, George F. Carter? A. I do.

Q. And in the year 1899 and prior thereto Mr. Carter had an account current in your office? A. He had.

Q. You have heard Mr. Carter's testimony? A. I have.

Q. And you also know that prior to February 21, 1899, Mr. Carter withdrew from your office, upon his account current, a considerable sum of money? A. He did.

Q. Did he tell you for what purpose that was?

A. It was withdrawn to buy a house—to give the money to his wife and buy her a house.

Q. He said nothing further to you then, except generally that it was to buy a house? A. That is all.

Q. Subsequently and on or about April 13, 1899, Mr. Carter opened an account in the name of his wife, did he not? A. He did.

Q. *About January, 1900*, do you remember the condition of this account? each of these accounts?

A. Yes, sir, the accounts were in bad shape; they got behind; each account was indebted to us.

Q. That is, indebted over and above the current value in the market of the securities that were carried as collateral? A. Yes, sir.

Q. And that condition had existed for some time before that? A. It had.

Q. With respect to the condition of those accounts, did you do anything at that time—have any talk with Mr. Carter? A. Yes, Mr. Carter and I talked the matter over in a casual way; and I had asked him several times; we had put no pressure on Mr. Carter to make the account good; we had done business with Mr. Carter for a great many years, a long time we did business together; and I knew that this property was bought for his wife, and the house was in her name, and her indebtedness to us I felt was secure as long as she had that property. I am the office man; my partners rely on me in the management of the office, and in our business accounts get behind, and they work out at different times; people come and trade, and new speculations go on; and as long as that house was there I felt that there was some

tangible security back of that account of Mrs. Carter's; that is the way I felt about it.

Q. At that time, then, you sent for Mr. Carter, did you not? A. I can't recollect exactly the day. I was going away, and I picked up a Plainfield Courier or a Plainfield Daily Press, I don't know which it was; it was an old copy; I say "old," probably three or four weeks old, to the best of my recollection, and I noticed that a mortgage had been put on a piece of property by George F. Carter in some way, and it worried me and bothered me. This was, I think, along in the early part of December, or the middle of December; some time in December; and I sent for Mr. Carter to explain it.

Q. What was your conversation with Mr. Carter? A. Well, as I said, I did get a little hot—he said I was excited; I was a little annoyed about it; and if I recollect right I made the remark to him—this is only my recollection of it—I said to him, "George, don't take any more away from us," or something of that kind—"it is bad enough as it is," or something of the kind; I won't say those were the exact words, but something to that effect.

Q. What did Mr. Carter say? A. Well, George—Mr. Carter—started to explain this matter to me, and said that he had put this—I can't recollect exactly—

Q. Well, what happened on January 11. A. On January 11 Mr. Carter came to me and said that mortgage *had been cancelled*; he said, "I will sit down here and write it on the mortgage," and he sat down next me and wrote on each paper, and handed them to me, and said put them in the safe,

or take care of them, or some words to that effect.

Q. And what did you understand the object of the transaction to be? A. That the property was still free and clear in his wife's name, as a protection—the property was free and clear in his wife's name.

By the Court:

Q. Did you suppose it was free and clear prior to that? A. *Absolutely.*

Q. Why did you so suppose? A. *I had always been given so to understand.*

Q. Did you know the amount of money that he was going to spend for this house for his wife? A. Somewhere I think about \$5,000; but I believe that in the six months, around through there, there was about \$8,500 withdrawn from the office.

Q. Did he tell you that he was going to use the money that he withdrew for the purpose of buying a house for his wife? A. He did, sir.

Q. Was that in conversation with you in the office, or just friendly conversation outside? A. *Well, it was in friendly conversation, I think.*

Q. And was there anything said in that conversation as to whether there was to be a mortgage on the house or not? A. I spoke to him about it; asked him what he was going to pay for it, and I believe he told me *about 5,000 and I was very glad at the time to have that done.*

Q. Did you think that he had given this house to his wife free and clear? A. *Absolutely.*

Q. Did you know of their living in the house? A. Yes, sir.

Q. They live there now. A. I believe so.

Q. Where is it—Fanwood? A. Yes, sir.

Q. Did he give you any description of it? A. I knew of it.

Q. Were you able to form an estimate in your own mind of its value? A. Yes, sir.

Q. Did that sum of \$5,000 seem to you to be a fair price? A. I thought it was a very cheap price for it.

Q. Did you suppose that he had paid all that in cash? A. For the place, yes, sir.

Q. What made you think so? A. *Because the money was drawn out to buy it.*

Q. You were aware of the fact that the money was all drawn out about one time, were you? A. Yes, but there had been some drawn out just before, and some just afterward, sir.

*Fourth direct by Mr. Heinsheimer:*

Q. And after you received these two papers on January 11, 1900, you continued to carry both those accounts? A. Yes, sir.

Q. You have also heard Mr. Carter's testimony as to the value of securities on certain days, and the condition of the account on those days. The values of stocks quoted upon the New York Stock Exchange are very fluctuating, are they not? A. Very; very fluctuating.

Q. And what is the nature of an account current in a broker's office? A. An account current is an open account, where a client buys and sells stocks on a margin.

Q. And as stocks are bought he is charged with the cost price? A. Yes, and credited with the proceeds of sales.

Q. And your firm pays for the same? A. Yes, sir.

Q. And receives the stocks? A. And receives the stocks.

Q. And when the same are sold he is credited with the selling price of the same? A. Yes, sir.

Q. The condition of the account on any day is never indicative of its ultimate result? A. Never.

Q. And what would you consider such an account? A. I don't understand the question.

Q. As to whether it is dangerous—hazardous, or not? A. I don't understand that question.

Q. Is such an account apt to change from time to time? A. Yes, sir, accounts change daily, active accounts.

Q. It all depends, of course, upon the activity of the speculator? A. Yes, and as to the kind of securities he is dealing in.

Q. And as to credit or debit balance? A. Yes, sir.

Q. On what also do these changes depend, upon the prices of the securities? A. The prices of the securities, yes.

*Cross examination by Mr. Man:*

Q. Did I understand you to say that your firm had bought any stocks for Mr. Carter or for Mrs. Carter subsequent to January 11, 1900? A. No, I don't think you understood me to say that; I don't think I testified to that effect.

Q. Well, did they or did they not buy stock? A. To the best of my belief—just pardon me a second, until I get the dates in my head; I think Mrs. Carter's account opened in the spring of 1899; and I am pretty positive that neither of them traded in any stocks, except that we carried along the old securities that were in the accounts—after January 11 the only transactions were sales for their

account after that date; that is the best of my belief.

Q. And then there is no additional credit given to them after that date? A. None was asked for, sir.

Q. It really was that you carried the stocks for a time longer, and then finally, in May, closed the accounts out? A. Yes, sir, that is it.

Q. You spoke about a running account, etc. You rendered Mr. and Mrs. Carter regular statements from time to time? A. Yes, sir, generally upon request; we make up accounts upon request.

Q. And those statements show the amount of the indebtedness, and you carry along the stock? A. Yes, sir.

Q. And give credit on the other side for sales? A. Yes, sir.

Q. That, I believe, is the general nature of your account? A. Yes, sir.

Q. Now you have heard Mr. Carter's testimony in regard to the ultimate disposition of these stocks by your firm? A. Yes, sir.

Q. Have you verified that in any way? A. I have not had time to verify it to-day.

Q. Well, from your recollection of the accounts on your books, didn't the amount of the sales of these stocks and bonds on the two days that have been mentioned by Mr. Carter more than pay off the indebtedness on those two days—if they had been sold on those two days I mean? A. I don't think they did, sir; I would not say, because I do not know; on the last date I think his figures are wrong. They may be right. I cannot carry the quotations in my head. I think the quotations given by him are practically correct.

Q. I am not speaking of the quotations, but of the net amount on your books. A. *I could not tell you, sir.*

*Direct examination by Mr. Heinsheimer:.*

Q. Intermediate to the carrying of these stocks on Mr. Carter's account of which he has testified, and the sales of those same stocks, other securities were bought and sold on his account? A. Yes, sir.

Q. Changing the nature of that account current from day to day? A. Yes, sir.

Q. So that it may have been that on or about February 21, 1899, there was carried as collateral to the account a certain security which was not sold until a year afterward? A. Yes.

Q. While intermediate to that time other securities may have been bought and sold? A. They may have been.

Q. And loss or profit resulted to the general account current? A. Yes, sir; I don't say there was; there may have been.

Q. And as a matter of fact the accounts of both Mrs. Carter and Mr. Carter ultimately showed a balance due you? A. *They did.*

Q. *After all credits?* A. After all credits.

Q. And sales of collaterals? A. After all sales of collaterals.

Q. And your firm *now have judgments against both Mrs. Carter and Mr. Carter for such amounts due your firm?* A. We have.

Q. And you have testified that after January 11, 1900, when these two exhibits, C. 1 and C. 4, were delivered to you, you continued to carry the account. A. Yes, sir.

Q. Will you explain what you mean by that?

A. We continued to carry the securities in the account; that is all.

Q. Suppose those exhibits, C. 1 and C. 4, *had not been delivered to you*, what would have been your course? A. Well, I would have consulted my partners about the matter, and under the circumstances *I think* the accounts would have been closed right up.

Q. And what would the purpose of that have been? A. To show that we felt that Mr. Carter was looking after himself and that we proposed to look after ourselves.

Q. Did you run any risk by continuing to carry the accounts? A. Most assuredly we did; we suffered by it.

Q. In what way? A. *Increased loss.*

Q. In other words, the collateral to the account became less valuable? A. Yes, sir.

Q. And the result was a debit balance against both Mr. and Mrs. Carter? A. Yes, sir.

Q. (By the Court.) Was that true of both accounts? A. Yes, sir.

Q. That the loss *increased* from the date of the surrender of these two papers to you to the time these accounts were closed up? A. Yes, sir.

Mr. Man: We formally offer in evidence the statements of Rolston & Bass that have been used. (Ex. 7 and Ex. 8.)

*Redirect by Mr. Keasby:*

Q. Take, for instance, the price of 100 shares of International Paper Company, common, sold in March; what could it have been sold for in January or February, 1900? A. I could not tell you the exact price; but I know that when these securities were sold the price had depreciated. I

will testify that the market in March was materially lower than it was in January.

Q. In what proportion? A. The percentages vary on different stocks.

Q. And on International Paper? A. Paper suffered; I should judge it was ten or fifteen points, anyway.

Q. And how much percentage was that, ten or fifteen points, on the stock? A. If the stock was selling at twenty-five it would be pretty close to fifteen per cent.

Q. And Federal Steel, common? A. Federal Steel common had been higher; the highest as I remember was seventy-four or seventy-five; at what date I can't recollect.

Q. Do you remember at what it was selling in January, 1900? A. No, sir; I do not.

Q. Do you remember the depreciation, if any, in Malt, preferred? A. Malt all went to pieces.

Q. Between what times? A. The early part of that year, according to my recollection.

Q. If that account had been closed and no security given, or rather if you had not received these papers and this assurance from Mr. Carter, would you have had a loss on Mrs. Carter's account? A. *I think we would*, but not such a large loss.

Q. Well, how much difference? A. It is impossible for me to say, because I have not any recollection of the prices in January: *I can't guess at it on the stand.*

Mr. Keasbey: I will ask leave to supplement this evidence by furnishing the details if it becomes necessary.

(After discussion, motion withdrawn.)

## DEFENDANTS REST.

The Court: Mr. Man, when Mr. Carter was on the stand you asked him a question in regard to a conversation between himself and Mrs. Carter; and there is an aspect of this case that was not presented to my mind at that time, in which that is material. You can adduce evidence to show that Mrs. Carter assented to this change by which the discharge of the mortgage was destroyed and substituted by an assignment to Mr. Carter as trustee; you can prove that?

Mr. Keasbey: Subject to my objection.

The Court: Yes; I don't deal with the legal effect of it now.

GEORGE F. CARTER, recalled on the part of the complainant and further testified as follows:

*Direct examination by Mr. Man:*

Q. On the 21st of February, after you had received the deed for the Fanwood property, conveying it to Mrs. Carter, subject to \$3,000 of mortgage, and had received the satisfaction piece from Miss Jane Man of that mortgage, did you have any conversation with your wife in regard to that mortgage and satisfaction piece; if so, state what it was?

Mr. Keasbey: I object to the statement in the question that it was conveyed subject to the mortgage.

Mr. Man: The deed shows for itself.

The Court: Yes, the deed contains that clause.

Mr. Keasbey: I object to its being put in the question.

Q. (By the Court.) Just state what conversation you had with Mrs. Carter after you got these papers about any change of arrangement. A. I don't believe I can state the details of any such conversation. My recollection of the matter is that I talked it over with Mr. Kyte; and that evening he came around to the house, and the three of us talked it over together, but any of the details of the conversation, I am sorry to say, are lacking in my memory.

Q. Was Mrs. Carter present? A. Oh yes, sir.

Q. Did she hear what was said? A. Indeed she did.

Q. (By Mr. Man.) What was the general purport of the conversation?

Mr. Keasbey: I think this is rather important, and I would like Mrs. Carter to leave the room.

Mr. Man: No objection to that.

The Court: As there is no objection I will let Mrs. Carter leave the room.

Q. Now tell us what was said in her presence?

A. The subject of the conversation was to this effect, that whereas I had originally stated to my wife that I intended to give the property of her free and clear, that on the advice of Mr. Kyte I had concluded it would be better to keep the mortgage alive by having it assigned to myself as trustee for our two children.

Q. And what did Mrs. Carter say to that? A. My recollection is that she assented, thought it was a good idea.

Q. (By the court.) Did she hear that new arrangement stated? A. Oh, yes, she heard it, and I think Mr. Kyte explained to her more fully than I did.

Q. Did she express any dissent? A. No; none at all.

Q. (By Mr. Man.) And then you had the assignment of the mortgage drawn up? A. Mr. Kyte attended to that.

Q. You had Mr. Kyte have an assignment of the mortgage drawn up, which he delivered to you subsequently, executed? A. Yes, sir.

Q. And then did you state to Mrs. Carter that you had received that assignment; that you had made that change? A. Well, I could not say whether I did or not.

Q. Mr. Kyte handed you the assignment, as I understand it, executed? A. Yes, he handed it to me.

Q. And acknowledged, and in the shape that it was put on record? A. Yes, sir.

By the Court:

Q. Where did he hand it to you? A. That I have no recollection of; I think most likely he handed it to me at the house; he was in the habit of coming around to our house in the evening very often—frequently. He might possibly have handed it to me on the train; I used to see him in and out of the train.

Q. Did Mrs. Carter learn of your having the assignment? A. Well, I can't say that I told her I had received it from Mr. Kyte, but I have no doubt that she did know it. My recollection is that we talked it over together, and that she con-

sented that it would be a good thing to do; and I suppose that we decided we would do it then and there; but whether I told her afterward that I had received it I really could not say; I don't know that I would have thought it necessary at the time to tell her so.

Q. You had the deed in your possession before this change of arrangement was suggested, did you not? A. Yes, sir, I had the deed in my possession.

Q. Do you know how the deed came to contain a clause to the effect that the conveyance was made subject to a mortgage of \$3,000. A. No, sir.

Q. Did you know that that was in the deed? A. I know it now; I think I knew it at the time.

Q. Well, can you explain how that came about? A. No, your Honor, I can't explain it.

Q. You will recall that you had received a deed and you paid the full amount, \$4,800? A. Yes, sir.

Q. And you had received a satisfaction of the mortgage which you were going to put on record? A. Yes, sir.

Q. So as to free the property altogether from the mortgage. Now can you tell us how it was that the deed came to contain a clause that it was subject to a mortgage for \$3,000? A. No, sir, I can not; in fact, I left nearly all of the details of the matter to Mr. Kyte, because I was entirely unfamiliar with real estate.

Q. Did you give the deed back to Mr. Kyte? A. No, I had that recorded myself.

Q. No, but after you had received the deed at Mr. Kyte's office and brought it away with you, with the satisfaction piece and the assignment? A.

No, sir, he never had it after that; it never was in his possession.

Q. Do you know in whose handwriting this clause at the end of the description in the deed is?

A. No, sir, I do not.

Q. Don't you recognize it? A. No, sir.

Q. Do you know Mr. Kyte's handwriting? A. Yes, sir; but I don't think this is.

Q. Have you any idea whose it is? A. No, sir.

Q. Do you know whether that was in the deed when you received the deed? A. I think that was put in at the time of the passing of the title; but why it was put in I don't know. I think, but I won't state positively, I think that Mr. Barrett wrote that.

Q. Who was Mr. Barrett? A. Mr. Barrett, I think he was a Notary Public, for one thing, or Commissioner of Deeds, and he was private secretary to Mr. Johnson, and Mr. Johnson was one of the officers of the Central Land and Improvement Company, and, of course, had a desk there, and Mr. Barrett had a desk in the same office. That is my impression, that Mr. Barrett wrote that at the time.

Q. At what time? A. Well, at the time the title was passed.

Q. Can't you tell us why he would write that at the time? A. No, I certainly can not.

Q. Making the conveyance subject to a mortgage when the mortgage was being paid off? A. No, I can't explain that at all, and I don't know anything about it.

*Further direct by Mr. Man:*

Q. (Showing the witness four papers.) Are

these all statements of account from Rolston and Bass that you received? A. Yes, sir.

(Offered in evidence; no objection; same received and marked C. 10, C. 11, C. 12 and C. 13, respectively.)

*Cross examination by Mr. Keasby:*

Q. Did you attend to putting the stamps on the deed; did you have anything to do with putting the stamps on the deed? A. No, sir, I don't think I put them on.

Q. Did you notice when you got the deed that it contained any exception of the mortgage? A. I don't understand that question.

Q. I notice in the warranty of the deed there is no exception of any mortgage. A. I don't know anything about that.

Q. And you didn't notice that? A. No, sir.

Q. You didn't notice whether it had any clause in it or not about the mortgage? A. No, except that I think that final clause on the first page was added at the office at the time of the passage of the title.

Q. The office was what? A. At the office of the Central Land Improvement Company, 143 Liberty street.

Q. Where did you meet the second time, when the assignment was made? A. I didn't meet; I had nothing to do with it; Mr. Kyte attended to it entirely.

Q. He had the deed at the time? A. No, sir, I had the deed; at that time the deed was undoubtedly in the County Clerk's office.

Mr. Man: It was recorded two days afterward.

Q. That is all.

*Re-Direct by Mr. Man:*

Q. To whom did you give the check for the purpose of paying off that mortgage? A. I gave that check to Miss Jane Man.

Q. Did you give that to Mr. Pentz at all? A. No, sir, I don't think I handed it to Mr. Pentz at all; I gave it to Miss Man.

Q. And then Mr. Pentz had conveyed to you the property subject to this mortgage, and you then handed the check to Miss Man for her satisfaction piece of the mortgage; was that the way the transaction was? A. I presume it was; I know I handed the check to her.

Q. It was a direct transaction between you and Miss Man? A. Yes, sir.

By Mr. Keasbey:

Q. You expected and intended that it was paid? A. Yes, sir.

Q. And the other was entirely afterthought? A. Yes, sir.

By Mr. Man:

Q. When did you get this deed back from the County Clerk's office? A. I could not tell you.

By Mr. Keasbey:

Q. It was sent by mail to you? A. No, I think I took it personally.

Q. How did you get it back. A. I could not tell you whether they mailed it to me or not; I don't know when I got it back, or how I got it; I simply cannot answer that question.

By the Court:

Q. Mr. Hooley knew of your buying this property for your wife, did he? A. Yes, I am very sure I told Mr. Hooley; not only Mr. Hooley, but I think I wrote to Mr. Bass, one of the other members of the firm; he was away South at the time; I know he was away sick, and they asked nearly all the customers there to write him a letter; I know I did write him, and I think I told him I had been fairly successful and had taken out enough money to buy a house.

Q. And that you had given it to your wife? A. Oh, I don't know that I said that in the letter; but I think very likely I did state that to Mr. Hooley.

Q. Mr. Hooley, then, knew that the moneys which you had drawn from the firm of Rolston and Bass had gone into this house? A. I think he did.

Q. And that the title was vested in your wife? A. Yes, sir.

Q. Well, when you changed the plan and instead of paying for the house you undertook to keep the mortgage alive for the benefit of your children, did it occur to you that you should notify Mr. Hooley of that? A. No, sir. Why should I?

Q. You thought that your own affair? A. Yes, sir; why of course that was my own affairs; I didn't consider I owed them anything; I knew that I had a credit balance there on my account current, and I didn't see any necessity to state that to anybody.

Q. You opened the account in Mrs. Carter's name on April 19? A. April 13.

Q. 13th I should say—following this transaction? A. Yes, sir; between February 21 and the

time I opened that account I had made a great deal more money there than I had previously. I had been fairly successful, and as I have already testified, I drew out, early in April, about \$4,000, and with that I bought some bonds, and two of those bonds I used to open this account for her.

Q. Didn't it occur to you when you opened that account in your wife's name that your wife would get credit on the strength of the ownership of this house? A. No, sir.

Q. Why not? A. Why, because I didn't consider that was necessary at all; I didn't look at that in that light. I gave them, as I say, these two bonds—\$2,000 of bonds—and I considered that quite sufficient collateral for the amount of stocks I intended to deal with on that account.

Q. Your idea was that whatever credit you or your wife got, would be based upon the collateral that you deposited, and not upon any land that she owed? A. No, sir, I didn't look at it in that light at all.

By Mr. Keasbey:

Q. Well, you had told them before that you had bought the house for her. A. Undoubtedly I told them I bought the house for her.

Q. And you put up only the margin with her account? A. Yes, sir, the ordinary ten per cent margin.

Q. And it was after you had told them that you had bought this house and put the title in her name? A. Yes, sir.

Q. Didn't you think you could do better with them if there was something in her name? A. No, sir.

Q. Don't you know that that had something to do with the credit that was given? A. No, sir.

Q. I mean to continue your credit when the margin got low? A. No, sir.

Q. Isn't it so, that it makes a difference? A. I presume it would make a difference; but I must say that I had been carrying an account and I had no real estate.

Q. But they were getting a little anxious about it? A. No, sir, I had more money then than at any other time, when I opened that account. I considered at that time that I had a surplus of *probably \$20,000 there.*

Q. Well it was changing from time to time constantly? A. Yes, it was changing; I had been making money right straight along.

Q. And drew out your money? A. Yes, sir, I drew out about \$5,000.

Q. That is all.

MRS. MAY L. K. CARTER, recalled on the part of the complainant.

Direct examination by Mr. Man:

Q. On the 21st of February, when this property was purchased by your husband, in your name, do you recollect of having any conversation with him in regard to the mortgage on it; if so, state generally. A. Yes, sir.

Q. State generally what the conversation was. A. Well, there was not much conversation, except that he suggested a mortgage for the children; and Mr. Kyte was there, and I thought it would be a good plan.

Q. And you consented to that? A. I did.

Q. What was it that Mr. Kyte advised to be done?

(Objected to.)

A. That the mortgage should be assigned to the children that Miss Man had.

Q. And what did you say to that? A. I agreed to it.

Q. You agreed with him that it should be done? A. Yes.

Q. Did you hear afterward whether it was done or not? A. Why, yes, I supposed that it had been.

Q. Did anybody tell you that it had been—did Mr. Carter or Mr. Kyte? A. Yes. I think Mr. Carter did tell me so.

By the Court:

Q. Why did you think it was a good plan? A. I thought it *would be a nice thing for the children.*

Q. Well, wouldn't it be a nice thing for the children if the property was in your name and free and clear? A. Why the children would not have anything to do with it then.

Q. No, you would have it? A. Yes.

Q. What was the special advantage in your mind in this arrangement of having the mortgage kept alive on your property? A. Well, as I said, I thought *it would be nice for the boys, to have something.*

*Cross examination by Mr. Keasbey:*

Q. Where was this conversation that you speak of? A. At home.

Q. With Mr. Kyte. A. At home in our house.

Q. At your house? A. In Fanwood.

Q. Where was Mr. Kyte; was he there? A. He came around in the evening.

Q. One evening; was that the same day that the assignment was made? A. Yes, sir.

Q. Or at some other time? A. No, it was just at that time.

Q. Was it the same time that the assignment of the mortgage was made? A. After they agreed to it they made it.

Q. They made it after that; on the same day? A. Well, that was in the evening that I agreed to it.

Q. Well, what day of the week was it, do you remember? A. No, sir.

Q. Do you remember what time in the month it was? A. It was the 21st of February, I think, 1899.

Q. What makes you think it was the 21st of February, 1899? A. Why, because that was the time we got the deed for the house.

Q. Where were you when you got the deed for the house? A. Why, Mr. Carter brought it home in the evening.

Q. That deed was delivered in New York, was it not? A. To Mr. Carter, I suppose, in New York, but I saw it in New Jersey.

Q. When did you first see it? A. When he first got it.

Q. You don't know how long after it was made you saw it? A. I think I saw it the same evening that he got it.

Q. You don't know when he got it, though? A. Yes, sir, the 21st of February.

Q. How do you know he got the deed on the 21st of February? A. Because I saw it.

Q. Because it is dated that day? A. I think it is.

Q. And that is the only way you remember the 21st of February? A. I don't remember it by anything else.

Q. Now this conversation with Mr. Kyle—he had nothing to do with the making of the deed? A. Who? Mr. Kyte?

Q. Mr. Kyte? A. Yes.

Q. Was he present when the deed was drawn? A. I guess he was; it was done in New York.

Q. He had nothing to do with that. Do you know what day it was that he came to your house in the evening? A. He came a good many evenings.

Q. He came a good many evenings, didn't he? A. Yes, sir.

Q. And do you know how long after this conversation of yours this assignment was made? A. I think it was made right after I agreed to it.

Q. Right the same day? A. It could not have been the same day, because it was that evening I agreed.

Q. You don't know how long a time elapsed before it was made? A. Soon after; I don't know just when. I think it was made right after I agreed to it.

Q. Now this assignment was made on the 10th of March; did you see it as soon as it was made? A. After it was made? Yes, but I don't know whether it was right after it was made or not; I saw it after.

Q. You didn't see it at the time it was made? A. Right after.

Q. And how soon after this conversation you

spoke of? A. Why, I could not say; soon after I agreed to it.

Q. It was all right at the same time? A. I don't know what you mean exactly by at the same time.

Q. You saw the assignment right after you agreed to it? A. Soon after.

Q. Suppose the assignment was made two weeks after the deed was made; do you know whether that was so or not? A. I think it must have been; I don't remember just how long it was.

Q. You don't remember when it was that you agreed to that assignment? A. Yes, sir, I told you I agreed that night when they came around to talk to me about it.

Q. But what night they came to talk to you about it you don't know, do you? A. I know it was made soon after.

By the Court:

Q. That night when they talked about it, was the way in which the assignment was to be made mentioned—to whom it was to be made? A. It was to be made for the children.

Q. And to whom; was anything said about that, or don't you remember? A. It was only for the children.

Q. But the mortgage was to be assigned to somebody for them? A. To Mr. Carter, as trustee, you mean?

Q. Yes, did you hear that mentioned? A. Yes, I think so.

Q. But what you recollect is that it was to be assigned for the benefit of the children? A. For the boys, yes.

*Further cross by Mr. Keasbey:*

Q. What was that for? Why for the children? What was the trouble about your holding the property for the children? A. Why, I would not hold it for them if it was in my name; it would not be theirs.

Q. And did your husband speak of going into these accounts with Rolston and Bass? A. He didn't do it at my order, no.

Q. Did you ever see the deed itself? A. Yes.

Q. Before it was recorded? A. I don't know about that—how soon is it recorded? I saw it rightaway, because Mr. Carter brought it home that night.

Q. You saw it the same night when Mr. Carter brought it home? A. Right after he got it I saw it.

Q. And did he show you the satisfaction piece? A. I don't know.

Q. Did he tell you he had paid the mortgage? A. No, I don't think he did; I don't remember about that.

Q. Do you know how much he paid for it? A. For the property? Yes, I think it was \$4,800.

Q. And did he tell you he had paid the money? A. That he paid for the house?

Q. Yes. A. Why, yes.

By the Court:

Q. Was it the same night that he came home with the deed that you heard the talk with Mr. Kyte about changing the arrangement, so as to keep the mortgage alive? A. I could not say; *I think it was.*

Q. Did Mr. Kyte come home with Mr. Carter that day or evening, when Mr. Carter brought the

deed? A. I think he did; but he came around afterwards; he didn't *come in with him; he came in alone in the evening.*

Q. When Mr. Carter brought the deed home did he tell you that the transaction was closed and that he had the deed? A. Why, when he brought it home I saw it.

Q. Did he give you any account of what had taken place? A. He told me Miss Man was down there, and told me who was in the office, and that Mr. Kyte was there.

Q. Did he tell you *he had paid off the mortgage?* A. No, sir, *it was agreed the mortgage should go to the children.*

Q. I mean when Mr. Carter first came home did he tell you then that the mortgage should remain for the children, or was that something that came up afterward? A. No, *It was all arranged I think when I saw the deed that the mortgage was to go to the children.*

Q. From whom did you first learn of that arrangement, that the mortgage was to go to the children—from Mr. Carter or Mr. Kyte? A. I think they were both there; we talked it over, and I agreed to it; I thought it would be a nice thing for the children to have.

Q. That was the first you heard of that arrangement, when they were both together and you heard them talking? A. I think it was.

Q. You are not sure whether it was the night he brought the deed home, or the next night, or some other night? A. No, I am not sure what night it was we talked it over.

Q. Did you know of your husband opening this account with Rolston and Bass in your name un-

til after it was opened? A. I didn't know; he consulted me about it, and I didn't want it done, and I don't know when he did it.

By Mr. Keasbey:

Q. You say he did consult you about it?

A. He did say something about it to me; but I didn't know whether he had already done it or not then.

Q. You endorsed checks in the matter of that account every time there was a check, did you not?

By Mrs. Carter;

A. I think only twice; I don't know.

Q. You knew he was engaged in that business?

A. Who?

Q. Your husband?

A. I knew he was speculating, yes.

Q. In your name?

A. No, I didn't know when he did it; I didn't know when he opened the account. I don't know whether I knew it before or not.

Q. That is all.

CASE CLOSED.

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### OPINION.

#### STATEMENT BY THE COURT.

The complainant George F. Carter as trustee for his two infant children, claims to hold a mortgage upon a house and lot in Fanwood, Union County, New Jersey, belonging to his wife, in which the complainant and his wife and these children reside, and he files his bill in this cause to foreclose the same.

The controversy is wholly between the complainant and the defendants William H. Rolston, Walter A. Bass and Edward S. Hooley, composing the firm of Rolston & Bass, stock brokers of New York City. These defendants, after the filing of the bill, recovered a judgment against Mrs. Carter and levied the same upon the mortgaged premises. Being admitted as parties defendant they filed an answer and cross-bill seeking to have the mortgage of the complaint declared inoperative as to them, and to have the same cancelled of record, to the end that their judgment may be a lien upon the whole property instead of the equity of redemption only, the latter being manifestly insufficient in value to pay the same. The two infants are made defendants and guardians have been duly appointed. The complainant is seeking to enforce solely the rights of these infant children. All the parties are before the Court and no objection is made to the form of the proceedings. The single question in the cause is whether the mortgage of the infants is a valid encumbrance as against the judgment of the defendants Rolston & Bass upon the real estate in question owned by the defendant Mrs. Carter.

For a long time prior to February 21, 1899, George F. Carter was a dealer in stocks in the usual way with Messrs. Rolston & Bass. His speculations had been successful. In February 1899 he drew out of his profits about \$4,800 for the purpose of buying a house for his wife, which purpose he causally mentioned to his brokers with whom he had somewhat intimate personal relations.

The gift of the house was effected on February

21, 1899. After this date Mr. Carter's account with Messrs. Rolston & Bass was continued and for two or three months to his substantial advantage. He drew out various sums of money and on April 3rd, drew in one sum \$4,010. and he swears that about that time he considered that he had a surplus in his account of probably \$20,000.

The relation of the market value of the stocks and other securities held by Messrs. Rolston & Bass in February and March 1899, to the account for which they were pledged, appears to have been such that the indebtedness of Mr. Carter to the brokers was amply secured. It was shown that the market price of these stocks at the dates under consideration was greater than the indebtedness by about \$3,000. It was also shown that subsequently these securities were sold at a price in the aggregate exceeding the indebtedness. The defendants made no effort to meet this proof but contended themselves with showing that the account was an open, running account, and was continued by the purchase and sale of securities, and finally was closed out in May 1900, a year later at a loss leaving Mr. Carter in debt to the brokers.

Mr. Carter selected for his gift to his wife the house and lot in Fanwood above mentioned, which she now owns and upon which he now claims to hold the mortgage sought to be foreclosed in this suit. At that time the house and lot were owned by Mrs. Leona Pentz while the mortgage was held by Miss Jane Man. The mortgage was a purchase money mortgage upon which there was due \$3,000 of principal.

Mr. Carter in pursuance of the purpose which he had formed, and in a friendly way had com-

municated to his brokers, at first undertook to vest the property as a gift in his wife free and clear of encumbrance. Accordingly on February 21, 1899, Mr. Carter, Mr. Pentz as the representative of his wife, and Miss Jane Man, met at the office in New York City of Mr. George Kyte, now deceased. Mr. Kyte was an intimate friend of Mr. Carter and Mr. Carter relied upon him to see that the business was done correctly. Mr. Pentz was accompanied by counsel. The entire purchase price agreed upon was \$4,800 of which \$100 had been paid by Mr. Carter to Mr. Pentz some week or two before. The balance of the consideration, \$4,700 was accordingly on February 21, 1899, paid by Mr. Carter as follows: \$1,700 by check for that amount endorsed by Mr. Carter so as to be payable to the order of Mrs. Pentz, and \$3,000 by similiar endorsement of Mr. Carter to Miss Jane Man.

Mr. Pentz delivered to Mr. Carter a warranty deed of the property which recites a consideration of \$5,500 in cash, and also recites that the property was thereby conveyed subject to a mortgage for \$3,000.

Miss Man delivered up the mortgage which she had brought with her together with a warrant for the satisfaction of the same, executed and acknowledged by her in the usual form.

Miss Man naturally would have brought the bond of Mr. and Mrs. Pentz which it is proved she received when she purchased the mortgage. Mr. Carter testifies that he has searched for the bond and cannot find it, but he is "quite certain" that this bond accompanied the assignment which was subsequently made to him. He may mean to testify that he is quite certain that the bond was produced by Miss Man with the mortgage.

Neither Mrs. Pentz nor her husband, who were the obligors named in the bond, nor the attorney who accompanied her husband, apparently charged with the duty of seeing that his interests were protected in the transaction, was produced as a witness. The bond being traced down to the date of the surrender of the mortgage I think the inference in the present condition of the proofs is unavoidable that Mr. Pentz or his attorney took possession of this retired obligation. Mr. Carter had no right to this bond which he had just paid off, nor would he or Mr. Kyte have cared to take possession of it. But Mr. Pentz or his attorney would, as a matter of course, desire to hold the surrendered bond as evidence of the payment of the debt which it had represented, at least as long as the evidence of such payment from the cancellation of the mortgage depended upon Mr. Carter's recording and paying for the record of the warrant.

The parties separated but later in the day before Mr. Carter could even report the transaction to his wife, or record the deed, or secure the cancellation of record of the mortgage, Mr. Kyte, suggested that Mr. Carter's gift to his wife of \$4,800 worth of property might more wisely be divided between the wife and the two infant children so as to give the wife the equity worth \$1,800 and give the children the mortgage interest worth \$3,000. This plan was immediately reported to Mrs. Carter and she gave her assent to it. The carrying out of the plan was entrusted to Mr. Kyte who procured an assignment in the usual form of the bond as well as the mortgage in question from Miss Man to "George F. Carter, trustee for Frank

E. Carter and James B. Carter." The assignment contained a covenant in the usual form on the part of Miss Man that there was due and owing on the bond and mortgage the sum of \$3,000 and interest thereon from February 21, 1899. Miss Man agreed in effect that the \$3,000 which she had received from Mr. Carter should be deemed the price of an assignment of the mortgage and the mortgage debt from her to him as trustee for the two infants, instead of the payment of the mortgage debt. She probably did not think to inquire into the whereabouts of the bond or she assumed that the bond had gone along with the mortgage into the possession of Mr. Carter. All the parties to the original transaction with the exception of Mr. and Mrs. Pentz, the makers of the bond, agreed upon a sort of novation of the various relations between them established by the transactions of February 21st.

The assignment of the bond and mortgage to the complainant was acknowledged by Miss Man on March 10th but there is nothing to show that there was any change of condition on the part of any one during the three weeks which it took Mr. Kyte to procure the assignment from Miss Man. The deed to Mrs. Carter reciting the existence of the mortgage for \$3,000 was promptly recorded on February 23, 1899. The assignment from Miss Man to Mr. Carter as trustee while delivered in March 1899 was not placed on record until October 3, 1899. The delay, however, in recording this assignment is shown to have been a pure accident. There is not a suggestion of any fraudulent purpose—of any intentional concealment of the existence of the assignment from anyone.

On April 13th, a month after Miss Man had executed and acknowledged the assignment to Mr. Carter as trustee, Mr. Carter opened a speculative account with Messrs. Rolston & Bass in the name of his wife. He took \$2,000 of the profits which he had drawn about a week before from his own account, as we have seen, and deposited it with the brokers in order to open a similar account with his wife. The evidence of Mr. Carter indicates that his project of transferring a part of his speculative business to his wife was formed by him within a few days before he carried it out—after April 3, 1899, when he drew \$4,010 on his account and purchased certain securities. However this may be, there is no evidence to suggest that on February 21st, or at any time until after March 10, 1899, any of the parties interested contemplated that Mrs. Carter would open an account with Messrs. Rolston & Bass or in any way become indebted to them. The \$2,000 in securities which Mr. Carter deposited with Messrs. Rolston & Bass as the basis of the account which they opened with Mrs. Carter, appears to have been a clear gift from husband to wife. The profits from the dealings on the new account went to the wife. The loss on the account which was determined a year later when the account was closed remained charged wholly against the wife and for it Messrs. Rolston & Bass sued the wife and recovered the judgment above mentioned against her upon which their whole case is based.

For a short time after the opening of the account with Mrs. Carter that account as well as Mr. Carter's account remained active and to a certain extent profitable, but before many months the accounts

became doubtful, no further purchases were made, and in the light of the then market value of the securities held by the brokers a loss in each case became probable. Still, as in all such cases, an element of uncertainty remained. A rise in stock values, might have enabled both accounts to be closed out with a profit to the dealer.

By January 1900 these accounts had apparently become hopelessly bad as brokers' accounts generally do when interest is running, no new deals are made and the securities are not improving in market value. About this time Mr. Hooley one of the members of this firm of brokers, saw in an old newspaper what appears to have been a report of the recording of the assignment of Mr. Carter as trustee which was done on October 3, 1899, as stated above. This witness testified that he learned from the newspaper "that a mortgage had been put on a piece of property of George F. Carter in some way" and that this information worried and bothered him. He says that he sent for Mr. Carter in order to get an explanation and that Mr. Carter started to explain although he (the witness) was excited and cannot recollect exactly in regard to the matter, and does not undertake to state what Mr. Carter said. Mr. Carter testifies that Mr. Hooley said "In the state of your wife's account that won't stand for five minutes" and Mr. Hooley testifies that he said "George don't take any more away from us. It is hard enough as it is" or something of that kind.

There is no substantial inconsistency between the testimony of Mr. Carter and Mr. Hooley as to this interview, which took place January 10, 1900. Mr. Carter, however, narrates with apparant ac-

curacy of memory a number of important statements made at this interview which Mr. Hooley does not disprove in the meagre testimony which he gives in regard to the matter.

Mr. Carter says that he endeavored to explain just how the "transaction came about,"—that the assignment was not a recent affair, as Mr. Hooley had evidently supposed, but had been made nearly a year before—that while he had at first intended to give the property to his wife free and clear he had changed his mind and given the mortgage to his children. This offered information Mr. Hooley in his excitement seemed not to take in or not to believe. Mr. Hooley apparently asked no questions and made no investigation as to the rights of the children. Mr. Carter protested that he had been "square" and left with the assurance that he would do what he could to right matters if he had not done what was right.

The next day, January 11, 1899, Mr. Carter brought the mortgage and assignment to Mr. Hooley and showed him the dates in order to prove to him that his statements made the day before in regard to the transaction were correct, to the effect that the assignment had been made in March 1899, and that "it was not a fresh transaction" and that he (Mr. Carter) "certainly did not put it on record with the intention of defrauding" Messrs. Rolston & Bass.

The result of this interview of January 11, 1900, was that Mr. Carter in Mr. Hooley's presence, wrote and signed a receipt for cancellation in the usual form upon the back of the mortgage, and also upon the back of the assignment, and delivered the papers to Mr. Hooley, it being understood that

they should be kept in the safe of Messrs. Rolston & Bass. No arrangement was made for having the mortgage cancelled of record, and the evidence strongly indicates that it was understood between Mr. Carter and Mr. Hooley that Messrs. Rolston & Bass were to hold the mortgage, with the receipt upon it, which would permit of its cancellation at any time, for their protection solely.

In the spring of 1900 when the probability that Messrs. Rolston & Bass would have a substantial claim against Mrs. Carter upon the closing out of her account, became practically a certainty, and the status of the trust for the benefit of the children naturally called for attention, Mr. Carter took the advice of counsel who advised him that he had no right to cancel the mortgage. He accordingly notified the county clerk not to cancel the mortgage except when it was presented by himself. A little later Mr. Carter as trustee filed this bill to foreclose his mortgage and Messrs. Rolston & Bass having obtained a judgment against Mrs. Carter were admitted as parties defendant as above stated.

Mr. E. A. Man for complainants.

Mr. E. Q. Keasbey and Mr. Norbert Heinsheimer  
(of New York) for defendants.

Stevenson, V.C.

The first question to be determined is whether these infants have an encumbrance to the extent of \$3,000 upon the property described in the bill of complaint, now owned by their mother, Mrs. Carter, which is a valid encumbrance as against her.

If the assignment made by Miss Man to Mr.

Carter on March 10th, in which Mr. Carter is described as trustee for the two infants could operate as a transfer to him of the property which it purported to convey, I think it is clear that a valid trust was created for the benefit of these infants. The settlement was voluntary, but whether it undertook to vest property which belonged to Mr. Carter or to Mrs. Carter, I do not think there can be any doubt that all parties to the transaction including particularly Mr. and Mrs. Carter, intended in good faith that the assignment should operate as a conveyance of property to Mr. Carter as trustee for the two infants. Whether in case it was an efficient conveyance it was void as against creditors of Mr. or Mrs. Carter is not at present under consideration. We are dealing in the first place with the narrow question whether the instrument operated to create a trust valid as between the infants and the donor or donors who created the trust. I find nothing in the testimony to impeach the validity of this voluntary settlement in the form of a trust as between the donor or donors on the one hand and the beneficiaries on the other, provided the forms employed to accomplish the intended result in fact operated so as to make a transfer of the property intended to be conveyed.

There is no pretence that either Mr. or Mrs. Carter procured the assignment of this mortgage to Mr. Carter apparently in trust to his children for any reason of convenience similar for instance, to those which induce savings bank depositors sometimes to open accounts nominally in their names as trustees for other persons when in fact no trust is intended, and the beneficial as well as the legal interest in the account is intended to be re-

tained. The mere fact that Mr. Carter retained the power to commit a breach of his trust by collecting the money and appropriating the same to his own use does not effect the fact that as between himself and his children the trust was absolutely established.

The donative purpose on the part of both Mr. and Mrs. Carter in endeavoring to transfer this mortgage to their two children is proved beyond doubt. The instrument declares the trust and is in form a legal conveyance. It created a valid trust if the property which it described in fact existed. *Viney vs. Abott*, 109 Mass. 300; *Green vs. Tulane*, 7 Dick. 169, 171; *Dunn vs. Houghton*, 51 Atl. Rep. 71 and cases cited.

Our first inquiry—therefore—is reduced to this: whether the assignment from Miss Man to the complainant as trustee operated as a legal conveyance of the mortgage interest which it purported to convey.

It is plain that the settlement which Mr. or Mrs. Carter or both of them endeavored to make for the benefit of their children was a voluntary settlement. The general rule is well settled that a gift to be operative must be completed: the donative purpose, however fully expressed is insufficient. Two main elements enter into every such donation as the one now under consideration, viz (1) the donative purpose, i. e., the intention to effect a transfer of property to the donee for his use and benefit, and (2) the use of means recognized by the law as efficient for the accomplishment of this donative purpose. It is a general rule that equity will not aid in carrying out an incomplete gift. Until the donor has actually effected his gift he may change his

mind. How far an uncompleted gift is enforceable after the death of the donor as a *quasi* contract where the donative purpose was not changed and the object of the donation is the support of children, need not be discussed in this case. *See Landon vs. Hutton, 5 Dick. 500.*

All the parties to the attempted voluntary settlement are alive and before the court in this cause. The point, therefore, to be determined is simply whether with this distinct donative purpose on the part of Mr. and Mrs. Carter they used means which the law recognizes as efficient to execute that donative purpose. If they did then we must go further and inquire whether this donation is also valid as against these judgment creditors, Messrs. Rolston & Bass.

A correct analysis of the situation, I think, will make it appear that the legal efficiency of this instrument of assignment to effect a voluntary transfer of property must be viewed very differently according as we deem Mr. Carter or Mrs. Carter to have been the donor. If Mr. Carter was the donor the mortgage at the time of the assignment represented an outstanding valid encumbrance upon Mrs. Carter's land and was owned by him in equity and could be conveyed under his direction by such an assignment as Miss Man executed.

If Mrs. Carter was the donor there was no mortgage in existence for her to transfer or procure to be transferred by Miss Man; it was necessary that Mrs. Carter should create or cause to be created or re-created an interest to the extent of \$3,000 in the lands which she then owned free and clear of any mortgage debt, and cause such interest

to be vested in Mr. Carter as trustee by virtue of the assignment from Miss Man.

If Mrs. Carter was the donor the donation consisted in what has been called the "revival" of a mortgage. The mortgage so supposed to have been revived was one to which Mrs. Carter was never a party and had never assumed; the debt secured by it had been knowingly paid without any feature of fraud or mistake, and the bond which the mortgage was give to secure not only had been discharged but remained discharged and is not supposed to have been revived. Mrs. Carter no doubt could enter into a valid *contract* subjecting her land to an encumbrance equal to and defined by any prior encumbrance thereon. How she could make a *gift* by procuring the former holder of this paid mortgage to execute an assignment of the same to the donee is difficult to perceive.

Whether Mrs. Carter may be charged with representations to Miss Man upon which she (Miss Man) assigned the mortgage and covenanted in her assignment that \$3,000 and interest was due thereon, and whether any estoppel against Mrs. Carter and ultimately in favor of these children would arise from these facts might be a question if all the evidence which plainly would throw light upon the subject had been produced.

But I do not think that it is necessary to decide the question whether in case Mrs. Carter must be regarded as the intending donor she succeeded in effecting a legal donation in trust for her children of an interest in her land to the extent of \$3,000 because the testimony satisfies me that Mrs. Carter was not the donor, intending or actual, inasmuch as she never was the owner of the subject matter of the

gift—that this whole voluntary settlement for the benefit of these children was the gift of their father, the complainant, and consisted of a transfer of property which belonged to him in equity and which he controlled.

I do not find from the evidence that the mortgage which Miss Man held for \$3,000 was ever paid so as to extinguish it. The amount undoubtedly was paid but by a person who was not bound to pay it, by a stranger acting solely with intent to make a donation to the person who was as he thought about to acquire the land upon which the mortgage was an encumbrance. Mr. Carter bought the land and undertook to discharge the mortgage as one transaction. He procured a deed from Mrs. Pentz to his wife; he procured the mortgage with a warrant for its satisfaction from Miss Man and paid to each of these parties a full consideration. He undoubtedly assumed that his wife would accept the gift or gifts which he was putting himself in a position to make to her. Mrs. Carter could accept the papers and thus ratify the acts of her husband and such ratification would, according to the familiar principle, relate back to the date of the delivery of the papers to Mr. Carter. But there is no contract of agency proved in this case which binds Mrs. Carter by the acts of her husband in receiving this deed from Mrs. Pentz and paying the \$3,000 to Miss Man and accepting a discharge of the mortgage.

Moreover, inasmuch as we are dealing with a pure gift, it would seem that Mr. Carter before delivering the papers to his wife or reporting the transaction to her, before his wife could in any way ratify what he had done, had the right to procure

the other two parties to unite with him in undoing all that had been done by exchanging back the things which they severally had received from each other. But whether there was this *locus penitentie* for Mr. Carter or not—assuming that he had completed the necessary legal form of a gift on his part by what was or took the place of a delivery—still the gift was incomplete because it was not accepted. Mrs. Carter not only did not accept but she expressly rejected the offered gift and so threw it back upon her husband's hands.

To constitute a valid gift there must be the assent of both parties. *14 A. & E. Ency. 2nd ed. p. 1027 and cases cited in n. 3.*

The necessary acceptance, i.e., the reception of the thing offered with assent to the donative purpose of the donor, may often be presumed, but such a presumption is founded not only on the beneficial character of the gift but also on either the absence of dissent to the gift or the presence of incapacity to assent or dissent. The proposed donee in this case was *sui juris*, and in the exercise of her liberty saw fit to decline the offered donation. She refused to accept both the deed and the discharge of the mortgage and the donor and donee agreed that the deed only should be accepted.

The result was that under a familiar equitable principle often applied where encumbrances are paid by mistake, the party so paying, who has been disappointed in his expectation under which he paid, is subrogated to the holder of the encumbrance and holds the same for his own protection.

The fact that the bond of Mr. and Mrs. Pentz had been discharged is a matter, it seems to me, of no consequence further than this that they might

justly claim that Mr. Carter after paying out his money knowingly and intentionally for the discharge of the mortgage debt, could not reinstate that debt as against them so as to hold them secondarily liable for the same merely because he had been disappointed in regard to the subsequent conduct of his wife, or had changed his own mind in regard to what he wanted to do in respect of the mortgage. Mr. Carter might be held as against the Pentzs to have taken the risk of his donative purpose not being carried out as he then intended. But, however, that may be, upon the plainest and simplest principles of equity applicable to such cases, Mr. Carter's subrogation to the rights of Miss Man would be complete as against Mrs. Carter. Mrs. Carter, with the advice and consent of her husband it is true, but nevertheless in the exercise of her own rights, declined to accept the discharge of this indebtedness from her land, or, speaking more accurately, declined to accept a conveyance of the land discharged of this mortgage and by accepting a conveyance of the land subject to the mortgage, she made her husband in equity the owner of the mortgage lien the amount of which he had paid to Miss Man.

It follows I think that when Mr. Carter and Mrs. Carter united through the agency of Mr. Kyte in procuring a transfer of the mortgage as an existing encumbrance to a trustee for the benefit of these infant children, the thing that was done in effect was a voluntary settlement in trust of an existing property right, an existing encumbrance which Mr. Carter had upon the land which then belonged to his wife.

While in equity Mr. Carter was entitled to be

subrogated to Miss Man as holder of the mortgage, his legal title required an assignment from her. When he accepted the assignment with a covenant of the amount due to himself as trustee for the two infants—an assignment under seal intended to be recorded and which was afterwards placed on record, the declaration of the trust was complete.

The second question to be determined is whether notwithstanding that this mortgage encumbrance of the infants is valid as against Mrs. Carter, it must be held fraudulent or void as against the judgment of Messrs. Rolston & Bass.

Although the answer and cross-bill of Messrs. Rolston & Bass do not charge that the assignment was made with intent to defraud existing or future creditors of Mr. Carter, that point was strongly urged in the argument. The evidence in my opinion not only fails to prove any such charge of fraud but seems almost to disprove it. But if upon any theory this transfer could be held fraudulent as against Mr. Carter's creditors, no advantage of that fact could be taken in this suit. These defendants appear as creditors of Mrs. Carter with a judgment which they hold against her property. If the assignment was fraudulent as to Mr. Carter's creditors so also was the conveyance of the land to Mrs. Carter. The complaint of these judgment creditors is not that Mr. Carter stripped himself of his property by a voluntary conveyance, and so rendered any claim of their against him of less value. Their complaint is that he did not make a larger voluntary conveyance to his wife so that they as her creditors might be more benefited than they were by the smaller gift which they do not wish to disturb.

The application made at the argument for leave to amend the cross-bill so as to set up a judgment recovered by the defendants against Mr. Carter and allege that the assignment was void as to his creditors comes too late and would apparently involve the trial not of alternative but inconsistent claims. The bill would be made to join two distinct causes of action—a proceeding to collect a judgment against Mrs. Carter out of her property, and a proceeding to collect a judgment against Mr. Carter out of his property. The two proceedings would seem to be based on contradictory theories of the ownership of the property in dispute.

If Messrs. Rolston & Bass have a judgment against Mr. Carter they must pursue any remedies which they may have to collect it in a separate suit.

The charge that the assignment to these children was fraudulent as to these defendants as creditors of Mrs. Carter is equally without merit. This charge is disposed of by the proposition that the assignment was not a conveyance of any property of Mrs. Carter's: it was a transfer of Mr. Carter's property which Mrs. Carter had declined to receive as a gift.

If, however, we must treat Mrs. Carter as the owner of property in February and March 1899, and this assignment of the mortgage as a voluntary transfer of an interest in her property, to her children, I see no proof of actual or constructive fraud in the transaction. Mrs. Carter was acquiring property by gift of substantial value. She owed no debts and did not contemplate owing any debt. No reason is suggested, if this assignment is to be treated as her donation, why she had not a perfect

right to make it for the benefit of her children as against all the world. The fact that weeks later her husband saw fit to take more of his profits from his business and start her in a speculative business which finally resulted in this indebtedness to these defendants and the judgment which they hold, cannot in any way color the donation which she made.

It was also argued that the evidence showed that Mr. Carter secured the division of his gift, refrained from cancelling the mortgage for the benefit of his wife, and procured the assignment of that mortgage to his infant children, for the purpose of "protecting the title" or "protecting the property" and that this fact in some way made the withholding of the benefaction from Mrs. Carter fraudulent as against her creditors. But Mr. Carter had a perfect right when he gave his wife the equity in the land to give his children the mortgage so as to prevent this mortgage interest from being subject to transfer by Mrs. Carter in any way or subject to claims of any creditors which she might afterwards have. For a man to give a part of his property so as to put it beyond the reach of his present or contemplated creditors is one thing; for a man to refrain from giving property to one man and instead thereof to give it to another so as to avoid the possibility that the creditors of the former may absorb it, is a very different thing.

There is one more claim of Messrs. Rolston & Bass which is set up distinctly in the answer, is supported by some evidence and calls for some consideration.

This claim, as pleaded, is that Mr. Carter for the purpose of obtaining further credit to his wife,

represented to the defendants that his wife was the owner of the premises in question free of encumbrance, and that on January 11, 1900, he produced the mortgage, assured the defendants that it had been paid, and wrote a certificate of cancellation upon it and delivered it so endorsed for cancellation to the defendants, and that thereupon they extended further credit to Mrs. Carter upon the faith of the assurance of Mr. Carter that the premises were free of encumbrance and that the mortgage had been satisfied, and further upon the faith of the endorsement of the receipt on the mortgage.

It is hardly necessary to deal with the charge of fraud in any representation that Mr. Carter made to the effect that the property was unencumbered. The proofs show that the only foundation for this charge is that the defendants knew of Mr. Carter's purpose to make a gift of the house free and clear and undoubtedly supposed that that purpose had been carried out exactly as intended. Mr. Carter never at any time made any statements in regard to this matter as the basis of any credit. The defendants merely found themselves in January 1900 in this position that they had given credit, or were maintaining a credit to a person who they then discovered had not received by way of gift certain property which they understood long before the account was opened some one had intended to give, and which they supposed had been given. The credit originally was given to Mrs. Carter on April 13, 1899, on the strength of \$2,000 in collateral donated by Mr. Carter to his wife and deposited with the brokers as security. There is no pretence that when the account was opened or at

any time afterwards Messrs. Rolston & Bass made any inquiry either of Mr. Carter or Mrs. Carter in regard to her property. If they saw fit to assume that Mr. Carter's original donative purpose had been carried out they took the risk of being mistaken.

That the cancellation of this mortgage by Mr. Carter, the trustee, for the purpose of increasing the property of his wife, and thus obtaining a larger or further credit for her, was illegal, does not seem to require argument. Such a destruction of his trust property would be a gross breach of trust of which the defendants certainly could not take advantage. If Mr. Carter had held \$3,000 in money as trustee for his children and had proposed to Messrs. Rolston & Bass to pay off a mortgage on his wife's land with the money, in order to enable them to give her further credit, the situation would not be materially different.

But the point which calls for consideration is this: it is charged that Mr. Carter on January 11th represented that the mortgage had been paid and offered to cancel it, and thereupon the defendants took possession of the mortgage which Mr. Carter then and there receipted for cancellation, and gave further credit to Mrs. Carter, from which further credit they suffered loss. Conceding that the trustee had no power to cancel the mortgage, to destroy the trust property for the benefit of his wife and her creditors, the claim is not that he cancelled the mortgage but that he represented that the mortgage had been cancelled or had been paid. Undoubtedly Mr. Carter had power to collect the mortgage and the mortgage was overdue. Assuming that a trustee in this situation can bind him-

self and his *cestuis que trust* by representing that a trust mortgage had been paid and producing it, and receipting it for cancellation, we have a case of estoppel which can be invoked only as far as some one has been injured. In order to establish this estoppel it must appear not that Mr. Carter cancelled the mortgage or promised to cancel the mortgage, or declared his willingness or ability to cancel the mortgage, but that he represented to these defendants that the trust mortgage had been paid, i.e., that he *had received* cash or property in lawful satisfaction of this mortgage for \$3,000 and interest; and it must further appear that the defendants believed this representation and had a right to believe it, and acted upon it to their loss. These things being true the mortgage is deemed cancelled but only to the extent necessary to indemnify the defendants against their loss. This is the familiar law of estoppel.

It is proved that Mr. Carter endeavored to explain to Mr. Hooley the whole transaction which resulted in the assignment to the children, and Mr. Hooley had ample opportunity to learn the facts. He had notice of the facts. The assignment with its covenant of amount due was exhibited and delivered to him. Mr. Carter probably stated that the mortgage debt *had* been paid to Miss Man. He may have said that the mortgage *had* at that time been cancelled or discharged. Mr. Hooley cannot complain of any such truthful statement when the other facts were submitted to him. When very skillfully cross-examined Mr. Carter, in answer to the leading question whether he did not tell Mr. Hooley that the mortgage "had been paid," answered, "Yes," and being further

questioned said that he did not mean "paid at the begining." The witness seemed to be speaking of the interview of January 10th, but I think that this is a mistake which further questioning would have corrected. The defendant's answer and cross-bill distinctly allege and Mr. Hooley distinctly testifies that the representation complained of, was made on January 11th. My conclusion is that whatever was said by Mr. Carter as to the payment, or as Mr. Hooley testifies, the cancellation of the mortgage, related either to the original payment to Miss Man which, in view of the facts of which Mr. Hooley had notice, was an immaterial matter, or to the unlawful cancellation which Mr. Carter offered and attempted to effect.

It is hardly credible that Mr. Carter on January 11th would have represented that he had been paid the mortgage debt which was due him as trustee, or if he did so represent that Mr. Hooley would have believed, or would have had a right to believe, such a statement. The mortgage in fact was uncanceled and in the possession of the trustee mortgagee. It had been recently recorded. The owner of the mortgaged land who apparently was the only person interested in procuring the payment of the mortgage, was practically insolvent as was also her husband, as Mr. Hooley well knew. Moreover the trustee was vindicating himself against charges and complaints of his creditors which impeached the fairness of the mortgage as it then stood before them. Mr. Hooley according to his own testimony, with the papers before him, made no inquiry as to the time or manner of this payment. He would not naturally have been ready to accept the bare statement of the trustee that the

mortgage had been paid if, indeed, he had a right to accept such statement without any inquiry on his part. The mortgage after being receipted was not delivered to Mr. Hooley in order that it might be cancelled of record, but was to be kept by Mr. Hooley in his safe. The parties do not seem to have contemplated the cancellation of the record unless the interests of the defendants required such cancellation. Subject to the protection which the possession of the receipted mortgage gave to the defendants claim against Mrs. Carter both parties apparently contemplated the continuance of the mortgage as a lien, and Mr. Carter testifies and his testimony is not in any way contradicted, that Mr. Hooley assured him that Mrs. Carter would not be further troubled about the mortgage.

Upon Mr. Hooley's meagre testimony the safe conclusion is that any statement of Mr. Carter about the cancellation of the mortgage related to the original discharge by Miss Man, or to the discharge which Mr. Carter undertook to effect, and that Mr. Hooley retained the receipted mortgage—the record remaining uncanceled—only for the benefit of his firm, well knowing that the mortgage had not been paid to the trustee, and therefore was to be preserved unless the interests of his firm required its cancellation.

I shall not deal in detail with the testimony as to the other necessary elements of an estoppel. It does not satisfy me that in reliance upon the alleged payment of the mortgage debt to the trustee (rather than an unlawful cancellation of the mortgage by the trustee) the defendants gave further credit to Mrs. Carter—refrained from closing her account by sale of her stocks. Most stockbrokers

under the circumstances would have been guided solely by their own interests in selling or keeping the securities which were pledged for Mrs. Carter's account. Mr. Hooley does not say that upon the strength of the statement that the mortgage had been paid the sale was delayed. His statement is that if the mortgage had not been *delivered to him* he *thinks* the account would have been closed right up for the purpose of showing that the defendants felt that Mr. Carter was looking out for himself and that they proposed to look out for themselves. This is not proof that the sale was delayed in reliance upon the false statement that the mortgage had been paid to the trustee: it may be some evidence that the sale was delayed in reliance upon the unauthorized cancellation of the mortgage by Mr. Carter.

Nor is it perhaps entirely plain that by delaying the sale a greater loss was incurred. Mr. Hooley states in substance that the market value of the securities declined after January 11, 1900 and consequently they sold for less money. This testimony is a general conclusion of the witness based upon his recollection of the market. The exact facts apparently were obtainable and the witness might have come prepared to give definite evidence not only of the loss but of the amount thereof. When asked to state the difference between what the account would have realized if closed in January, and the amount actually received, Mr. Hooley stated that it was impossible for him to do so because he did not have "any recollection of the prices in January" and he could not on the stand "guess at" the difference.

With the burden of proof upon the defendants

in my judgment they fail to establish an estoppel for the benefit of their alleged additional loss on Mrs. Carter's account incurred by reason of a decline in value of the securities after January 11, 1900.

The decree will establish the complainant's mortgage as an encumbrance prior to the defendant's judgment.

IT IS HEREBY STIPULATED AND AGREED, by and between the parties to the above entitled cause, that the amount of the principal and interest thereon to date, of the complainant's mortgage is three thousand six hundred and fifty-seven dollars (\$3,657.00), and that the amount of the judgment of the defendants William H. Rolston, et als., and interest thereon to date, is five thousand two hundred and ninety-nine dollars and seventy-eight cents (\$5,299.78), and that said sum may be inserted in the above final decree in said cause, as the amounts due to the complainant and said defendants respectively. The purpose of this stipulation being to dispense with a reference to ascertain and report the amount due on said mortgage and judgment respectively.

Dated October 19, A. D. 1902.

E. A. S. MAN,  
*Solicitor of Complainant.*  
 A. Q. KEASBEY & SONS,  
*Solicitors of Defendants*  
*Rolston & Bass.*

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 FINAL DECREE.

This cause coming on to be heard, in the presence of E. A. S. Man, of counsel with the Complain-

ants, and E. Q. Keasbey of counsel with the defendants William H. Rolston, Walter A. Bass and Edwin S. Hooley, the defendants Frank E. Carter and James B. Carter, infants, having, by their guardian *ad litem*, the Clerk of this Court, answered in the way of a cross bill filed in this cause by the defendants last above named, and submitted themselves to the judgment of this Court, and the complainant's bill having been heretofore taken as confessed against the other defendants, and the pleadings having been read, and the testimony of witnesses and proofs having been taken in open Court, and the arguments of the respective counsel having been heard and considered, and the Court having duly considered said pleadings, evidence, proofs and arguments, and it appearing to the Court that on the Sixteenth day of April, one thousand eight hundred and ninety-four, Leona Pentz and William E. Pentz, her husband, executed and delivered the Bond and Mortgage set out and described in the bill of complaint, on the premises therein described, to The Central New Jersey Land Improvement Company, to secure the payment of three thousand five hundred dollars and interest thereon; that on the sixth day of January, one thousand eight hundred and ninety-nine, the said The Central New Jersey Land Improvement Company duly assigned and delivered said Bond and Mortgage to Jane Man; that on the Twenty-first day of February, one thousand eight hundred and ninety-nine, said Jane Man duly assigned said mortgage to George F. Carter, Trustee for Frank E. Carter and James B. Carter, the Complainant in this cause; that on the Twenty-first day of February, one thousand eight hundred and ninty-nine,

the said Leona Pentz and William E. Pentz, her husband, duly conveyed the lands and premises described in said mortgage to the defendant, May L. K. Carter; that on the Fifth day of December, one thousand nine hundred, the defendants William H. Rolston, Walter A. Bass and Edwin S. Hooley recovered a judgment, in the Supreme Court of the State of New Jersey, against the defendant May L. K. Carter for the sum of four thousand seven hundred and sixty-three dollars and eighty-five cents; that the said mortgage assigned to the complainant as aforesaid is a good, valid and subsisting lien and encumbrance upon the said premises described therein and in the bill of complaint herein in favor of the complainant, and is prior in lien to the lien of the said judgment of said defendants; that the title to and ownership of the said mortgage is in the complainant herein as Trustee for his infant children, the defendants Frank E. Carter and James B. Carter; that the complainant is entitled to the relief sought and prayed for by him in his bill of complaint and in his replication; that the said mortgaged premises should be sold, and the proceeds of such sale applied, first, to the payment and satisfaction of the complainant's costs to be taxed and of the said mortgage of the complainant, second, to the payment and satisfaction of the said judgment of the said defendants William H. Rolston, Walter A. Bass and Edwin S. Hooley, and that any surplus of such proceeds should be paid into this Court to abide its further order; that there is due on said mortgage to the complainant, at the date of this decree, the sum of three thousand six hundred and fifty-seven dollars; that there is due on the said judg-

ment of the said defendants William H. Rolston, Walter A. Bass and Edwin S. Hooley, at the date of this decree, the sum of five thousand two hundred and ninety-nine dollars, and seventy-eight cents; that the whole of said mortgaged premises should be sold in one parcel, to raise and pay the moneys due as aforesaid, with lawful interest thereon to be computed from the date hereof and added to each of said sums; that so much of the answer of said defendants William H. Rolston, Walter A. Bass and Edwin S. Hooley as is by way of a cross bill should be dismissed.

It is thereupon, on this twenty-eighth day of October in the year of our Lord one thousand nine hundred and two, by his Honor William J. Magie, Chancellor of the State of New Jersey:

ORDERED, ADJUDGED and DECREED, and the said Chancellor doth, by virtue of the power and authority of this Court, hereby order, adjudge, and decree, that the said mortgaged premises be sold to raise and satisfy the several sums of money due to the said Complainant and the said Defendants, that is to say, to said Complainant, the sum of three thousand and six hundred and fifty-seven dollars, with lawful interest thereon to be computed from the date of this decree, together with the Complainant's costs in this cause to be taxed; and in the second place, to pay unto the Defendants William H. Rolston, Walter A. Bass and Edwin S. Hooley, the sum of five thousand two hundred and ninety-nine dollars and seventy-eight cents, together with lawful interest thereon to be computed as aforesaid, the amount of the said judgment recovered by them against the defendant May L. K. Carter and interest thereon. And that a WRIT

OF FIERI FACIAS do issue for that purpose out of this Court, directed to the Sheriff of the County of Union commanding him to make sale, according to law, of the said mortgaged premises; and that out of the money arising from such sale, he pay to the Complainant, or to his Solicitor, said debt, interest, and costs; and also to the aforesaid Defendants, or to their Solicitor, their said debt, and interest, in manner aforesaid; and in case more money should be raised by the said sale than shall be sufficient to answer such several payments, that such surplus be brought into this Court, to abide the further order of the Court, unless otherwise previously disposed of by the order of this Court: and that the said Sheriff make return without delay of his proceedings by virtue of the said writ.

And it is further ORDERED, ADJUDGED and DECREED, that the Defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises, when sold as aforesaid by virtue of this decree.

And it is further ORDERED, ADJUDGED and DECREED that the answer in the way of a cross bill herein of the said defendants William H. Rolston, Walter A. Bass and Edwin S. Hooley, be and the same is hereby dismissed.

W. J. MAGIE, C.

Respectfully advised,  
Eugene Stevenson, V. C.

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#### NOTICE OF APPEAL.

Notice of Appeal by William H. Rolston, Walter A. Bass and Edwin S. Hooley, was filed October 28, 1902, and served October 31, 1902.

## PETITION OF APPEAL.

TO THE HONORABLE THE COURT OF  
ERRORS AND APPEALS:

The petition of William H. Rolston, Walter A. Bass and Edwin S. Hooley, appellants in the above stated cause, and three of the defendants in the Court below, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, William J. Magie, Chancellor of the State of New Jersey, hearing date the twenty-eighth day of October, nineteen hundred and two, wherein George F. Carter, Trustee, was complainant, and May L. K. Carter and these appellants and others, were defendants, in this respect to-wit, that the said decree adjudges that the mortgage therein referred to was duly assigned by Jane Man to the complainant as trustee for Frank E. Carter and James B. Carter, and that the said mortgage is a good, valid and subsisting lien and encumbrance upon the premises described therein in favor of the complainant and is prior in lien to the lien of the judgment of the appellants, and that the title to and ownership of said mortgage is in the complainant as trustee for his infant children, and that the complainant is entitled to the relief sought and prayed for by him in his bill of complaint and replication, and that the mortgaged premises should be sold and the proceeds of such sale applied first to the payment and satisfaction of the complainant's cost to be taxed and of the said mortgage.

And your petitioners humbly appeal from that part of the decree which adjudges and decrees as aforesaid upon the ground that the same is errone-

ous for that it should have been declared by the said decree that said mortgage had not been lawfully assigned to the complainant as Trustee or otherwise, but that it had been paid and given up to be cancelled and was not a subsisting lien upon the premises, and was void as against the appellants, and the complaint was not entitled to enforce the same against the appellants, nor to a decree for the sale of the mortgaged premises, and that the complainant should execute and deliver a discharge of the said mortgage.

A. Q. KEASBEY & SONS,  
*Solicitors.*

EDWARD Q. KEASBEY  
*of Counsel.*

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ANSWER TO PETITION OF APPEAL.

A formal answer to the petition of appeal was filed.

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**EXHIBITS.**

C. 1.

Leona Pentz, wife of William E. Pentz, and William E. Pentz, To The Central New Jersey Land Improvement Co.	Mortgage Dated April 16, 1894, Ackd. April 16, 1894, Recd. May 3, 1895, Book 126, Page 344, Consid. \$3,500.
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Covers premises in the township of Fanwood,  
County of Union.

Endorsement in blue ink:

Jan. 11, 1900.

The within mortgage having been duly satisfied the Clerk of Union County is hereby authorized to cancel the same of record.

GEORGE F. CARTER, *Trustee*.

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C. 2.

<p>The Central New Jersey Land Improvement Co.</p> <p style="padding-left: 40px;">To</p> <p>Jane Man.</p>	<p>Assignment</p> <p>Dated Jany. 6, 1899, Proved Jany. 6, 1899, by George Kyte, Secretary. Recd. Jany. 7, 1899, Book 33 of Assign- ments, page 110. Consid. \$3,365. 58.</p>
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Assigns the foregoing mortgage with covenant that there is due \$3,000 of principal and \$365. 58 interest, and that said mortgage is a first and paramount lien on the premises therein described except taxes, if any be unpaid thereon.

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C. 3.

<p>Jane Man,</p> <p style="padding-left: 40px;">To</p> <p>George F. Carter, Trus- tee for Frank E. Carter and James B. Carter.</p>	<p>_____</p>
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KNOW ALL MEN BY THESE PRESENTS,  
that I, Jane Man party of the first part, in consider-

ation of the sum of Three Thousand Dollars lawful money of the United States of America, to me in hand paid by George F. Carter, Trustee for Frank E. Carter and James B. Carter party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over unto to the said party of the second part a certain Indenture of Mortgage bearing date of the Sixteenth day of April One Thousand Eight Hundred and Ninety-four made by Leona Pentz, wife of William Pentz, and William Pentz on lands in the township of Fanwood, County of Union, State of New Jersey, to secure the payment of the sum of Three Thousand Five Hundred (\$3,500.00) dollars, which mortgage is registered in the Clerk's office of the County of Union in Book 126 of Mortgages, pages 344, etc. Together with the bond or obligation therein described and the money due and to grow due thereon, with the interest. To have and to hold, the same unto the said party of the second part his heirs, executors, administrators or assigns for his and their use forever, subject only to the proviso in the said Indenture of Mortgage mentioned: AND I do hereby make, constitute, and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name, or otherwise, but at his proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment, to discharge the same as fully as I might or could do if these presents were not made: And I do hereby covenant,

promise and agree, to and with the party of the second part, that there is now due and owing upon the said Bond and Mortgage the sum of Three Thousand (\$3,000.00) dollars with interest thereon, from the twenty-first day of February, One Thousand Eight Hundred and Ninety-nine.

IN WITNESS WHEREOF, I have hereunto set my Hand and Seal the twenty-first day of February in the year of Our Lord One Thousand Eight Hundred and Ninety-nine.

JANE MAN.

Signed, Sealed and Delivered in the presence of  
GEORGE KYTE.

State of New Jersey, County of Union, SS.:

Be it remembered, that on this 10th day of March in the year of Our Lord, One Thousand Eight Hundred and Ninety-nine before me a Commissioner of Deeds in and for said State personally appeared Jane Man, unmarried, who, I am satisfied is the assignor in the within Deed of Assignment named; and I having first made known to her the contents thereof, she did then acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

GEORGE KYTE,  
*Commissioner of Deeds, N. J.*

Endorsement in blue ink:

Jan. 11, 1900.

The within mortgage having been duly satisfied the Clerk of the Court is hereby authorized to cancel the same of record.

GEORGE F. CARTER, *Trustee.*

Endorsed: Received in the Clerks office of the County of Union on the 3rd day of October A. D. 1899 at 10 o'clock in the forenoon and recorded in book 33 of Assignments of Mortgages for said County on page 565.

WILLIAM HOWARD,  
*Clerk.*

(In pencil)  
GEORGE KYTE.

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C. 4.

Leona Pentz and William E. Pentz her husband of the city of New York.

To

May L. K. Carter, of the township of Fanwood, Union Co., N. J.

Deed

Dated Feby. 21, 1891,  
Ack. Feby. 21, 1899,  
before Samuel M. Richardson, a Commissioner of Deeds in New York.  
Recorded Feby. 23, 1899,  
Book 248, page 27,  
Consideration \$5,500.

Grants, bargains and sells to the party of the second part her heirs and assigns premises in the township of Fanwood, in the County of Union, the same as described in mortgage Exhibit, C. I.

After the typewritten description are the following words written in ink.

“Subject to a mortgage on which there is now unpaid the sum of \$3,000 and interest from Jan. 16, 1899.”

The deed contains a covenant that Leona Pentz is the sole and right owner of the premises and that the premises are not encumbered in any way whatsoever and that the parties of the first part have good right and full power to convey and also that said Leona Pentz will warrant secure and forever

defend said land and premises to the party of the second part her heirs and assigns free and discharged of all manner of encumbrances whatsoever.

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C. 5.

Check No. 252, dated Plainfield, N. J., Feb. 7, 1899, on the First National Bank of Plainfield to the order of W. E. Pentz for the sum of One Hundred Dollars, signed George F. Carter.

Endorsed: Pay to the order of W. E. Pentz & Co.  
W. E. PENTZ.

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C. 6.

Check No. 255, dated Plainfield, N. J., Feb. 15, 1899, on the First Nation Bank of Plainfield, to the order of George F. Carter for One Thousand Seven Hundred Dollars, signed by George F. Carter. Certified Feb. 16. 1899. Endorsed: Pay to the order of Mrs. Leona Pentz.

GEORGE F. CARTER,  
LEONA PENTZ, W. E. PENTZ, *Atty.*

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C. 7.

Check No. 254, dated Plainfield, N. J., Feb. 15, 1899, on the First National Bank of Plainfield to the order of George F. Carter, Three Thousand Dollars, signed, George F. Carter. Certified Feb. 16, 1899. Endorsed: Pay to the order of Miss Jane Man,

GEORGE F. CARTER.  
JANE MAN.

C. 7a.

**STATEMENT OF ACCOUNT.**

February 20, 1899.

No. Shares	STOCKS	Market Value	VALUE	DATE OF SALE	AT	FOR
10	Consolidated Ice, common.....	46	\$ 460.00	May 11, 1900	39	\$ 388.55
100	Pacific Coast Co., 2d preferred.....	67	6,700.00	May 11, 1900	57	5,685.50
100	People's Gas Co.....	116	11,600.00	March 8, 1899	112	11,185.50
100	Mobile & Ohio.....	40	4,000.00	March 8, 1899	37½	3,735.50
100	St. Louis Southwestern, preferred....	30½	3,050.00	March 8, 1899	27½	2,735.50
100	International Paper Co., preferred...	62	6,200.00	May 9, 1899	49¼	4,910.50
100	Federal Steel Co., preferred.....	88	8,800.00	March 8, 1899	87¼	8,710.50
100	Federal Steel Co., preferred.....	88	8,800.00	March 8, 1899	87¾	8,723.00
50	New York Air Brake.....	150	7,500.00	April 25, 1899	195	9,742.75
5	St. Louis Southwestern, 2d Mtg bonds.	54	2,700.00	March 8, 1899	51½	2,568.00
			\$59,810.00			58,386.05
	Indebtedness as per state- ment R. & B., Mch 9, 1899.			Am't of Indebted- ness .....		55,014.86
	Balance to credit.....	4,795.14	\$59,810.00	Surplus .....		3,371.19

C. 8.

**STATEMENT OF ACCOUNT.**

March 9, 1899.

No. Shares	STOCK	Market Value	VALUE	DATE OF SALE	AT	FOR
10	Consolidated Ice, common.....	47 $\frac{1}{2}$	\$ 475.00	May 11, 1900	39	\$ 388.55
50	New York Air Brake.....	160	8,000.00	April 25, 1899	195	9,742.75
100	International Paper Co., common....	54	5,400.00	May 9, 1899	49 $\frac{1}{4}$	4,910.50
100	American Tin Plate Co., common....	40	4,000.00	March 15, 1899	43 $\frac{3}{4}$	4,310.50
100	American Steel & Wire Co., common..	64	6,400.00	March 10, 1899	64 $\frac{1}{4}$	6,410.50
100	Pacific Coast Co., 2d preferred.....	64	6,400.00	May 11, 1900	57	5,685.50
			\$30,675.00			31,448.30
	Indebtedness R. & B., state- ment, March 9, 1899.....	\$27,613.63		Am't of Indebted- ness .....		27,613.63
	Balance to credit.....	3,061.37	\$30,675.00	Surplus .....		3,834.67

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C. 9.

New York, April 13 1899.

Received from Mrs. Mary L. Carter, Two  
Thousand, Geo. Cens. 1-5, 10674-5 dollars.

ROLSTON & BASS.

I. B. ONERY.

